Supreme Court, U.S.
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No. 99-

IN THE
Supreme Court of the United States

JAMIE MESSENGER,

Petitioner,

v.

GRUNER + JAHR PRINTING AND PUBLISHING,
also known as GRUNER + JAHR, USA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Where a trial judge and jury determine that a media defendant published an article falsely reporting upon a professional model's life with knowledge of the falsity or in reckless disregard of the truth, can the Circuit Court and Court of Appeals hold that the First Amendment privilege of newsworthiness prohibits liability without contravening the express mandates of *Sullivan*[1], *Time Hill*[2], and their progeny?

2. Have the Circuit Court and Court of Appeals violated Federal First Amendment jurisprudence, the law of the State of New York, and the decisions of States sister to New York, by creating an absolute immunity for a media defendant to interweave photographs with an article that knowingly identifies plaintiff as the subject of a fictional account?

3. Have the Circuit Court and New York Court of Appeals traversed accepted Constitutional boundaries by rendering New York a safe haven in the Internet Era for the media's knowing publication of photographs interwoven with text in a manner that falsely presents a person's autobiography causing her mental distress?

4. Can the New York Courts preclude a plaintiff from proffering evidence of, and obtaining punitive damages for, the grossly irresponsible fabrication of an article that is interwoven with her images in a manner that creates the false impression in the ordinary reader's mind that she is the subject of the article?

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1. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

2. *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

LIST OF PARTIES TO THE PROCEEDING

The petitioner, Jamie Messenger, the plaintiff below, was a minor when this action was commenced, and hence represented by Donna Messenger, her mother and "next friend." She has since reached the age of majority. The petitioner was also the appellee/cross-appellant in the Circuit Court and New York Court of Appeals.

Respondent, Gruner + Jahr Printing and Publishing, also known as Gruner + Jahr USA ("Gruner + Jahr") was a defendant below, and the appellant/cross-appellee in the Circuit Court and New York Court of Appeals.

Sally Lee was a defendant in the trial court, but was not party to the appeal and is not a respondent in this Court.

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CITATION OF THE REPORTS OF OPINIONS IN THIS CASE

On February 28, 2000, the Circuit Court vacated the judgment of the District Court in reliance upon responses to questions certified to the Court of Appeals of the State of New York. *Messenger v. Gruner + Jahr, et al.*, 208 F.3d 122 (2d Cir. 2000) (hereinafter referred to as "*Messenger V*;" which contains "*Messenger IV*;" *See* Appendix A).

The Court of Appeals' responses to the certified questions were provided on February 17, 2000. *Messenger v. Gruner + Jahr, et al.*, 94 N.Y.2d 436 (*Messenger IV*). The Court of Appeals accepted certification on June 8, 1999 ("*Messenger III*;" *see* Appendix B), following the Circuit Court's certification on April 28, 1999. *Messenger v. Gruner + Jahr, et al.*, 175 F.3d 262 ("*Messenger II*;" *see* Appendix C). The underlying decision of the District Court was rendered on March 13, 1998. *Messenger v. Gruner + Jahr, et al.*, 994 F. Supp. 525 ("*Messenger I*;" *see* Appendix D).

BASIS FOR JURISDICTION

The Circuit Court's judgment (*Messenger V*), which issued on February 28, 2000, is final. No petition for reargument or motion for extension of time in which to file this petition has been filed. Accordingly, this Court has jurisdiction to review the Circuit Court's judgment by writ of certiorari, pursuant to 28 U.S.C. § 1254(1). Since final judgment was entered, the Circuit Court's jurisdiction to consider the District Court's decision (*Messenger I*) in connection with the appeal was proper under 28 U.S.C. § 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The New York Civil Rights Act §§ 50, 51, as amended (the "Statute"), and the Constitutional provisions (the First and Fourteenth Amendments) are set forth verbatim in Appendix E.

STATEMENT OF THE CASE

In 1967, this Court reviewed the Statute, and stated:

> We hold that the constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth. . . .
>
> We, therefore, confidently expect that the New York courts will apply the statute consistently with the constitutional command.

Time Inc. v. Hill, 385 U.S. 374, 387-388, 397 ("*Time Hill*").

On February 17, 2000, the Court of Appeals stated in *Messenger IV*, 94 N.Y.2d at 442-443:

> Consistent with the statutory — and constitutional — value of uninhibited discussion of newsworthy topics, we have time and again held that, where a plaintiff's picture is used to illustrate an article on a matter of public interest, there can be no liability under sections 50 and 51 unless the picture has no real relationship to the article or the article is an advertisement in disguise.[3] . . . That has been so even where a plaintiff's photograph, when juxtaposed with an article, could reasonably have been viewed as falsifying or fictionalizing plaintiff's relation to the article.

Conspicuously absent from the majority's opinion in *Messenger IV*, and never mentioned in *Messenger V*, is this Court's enunciation of the constitutional command in *Time Hill*. Rather, *Time Hill* is ignored by the courts below.

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3. *Arrington v. New York Times*, 55 N.Y.2d 433 (1982) ("*Arrington*"); *Howell v. New York Post*, 81 N.Y.2d 115 (1991) ("*Howell*"); *Finger v. Omni*, 77 N.Y.2d 138 (1990) ("*Finger*"); *Murray v. New York Magazine*, 27 N.Y.2d 406 (1971) ("*Murray*").

If left unchanged, the New York Courts will have created an exception for photographs juxtaposed with text — boosting one medium of expression over all other forms of speech — irrespective of the calculated falsehood of the content. Yet, precisely the opposite has heretofore been the rule: content, not form, is at issue, irrespective of the medium of expression. *United States v. O'Brien*, 391 U.S. 367 (1968). *Cf. Spence v. Wahington*, 418 U.W. 405 (1974); *Cohen v. California*, 403 U.S. 15 (1971).

The Court of Appeals struggles to support its artificial and incorrect distinction of types of speech, by averring that the *article* in issue in the case at bar "was concededly newsworthy."[4] *Messenger IV*, 94 N.Y.2d at 440 and 444. This conclusion is, however, flatly contradicted by the District Court's recognition that only the *subject matter not the content* was newsworthy:

> Plaintiff does not, and in any case could not, seriously dispute that the **subject** of the column at issue — teenage sex and its consequences — falls within the broad reach of the newsworthiness exception to the statute. [Emphasis added.]

Messenger I, 994 F. Supp. at 528 (footnote omitted).

Moreover, even assuming that the Court of Appeals were correct in labeling the article in issue as "admittedly newsworthy," such a label leaves unchanged the outcome under this Court's constitutional command. Indeed, the article in *Time Hill* was itself found to be newsworthy and a matter of "public interest," *Time Hill, supra*, 385 U.S. at 386 and 388. The standard of knowing fictionalization was nonetheless applied.

It is gravely feared that, absent this Court's interdiction, the courts below will have rendered the Statute a "dead letter"

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4. Petitioner never admitted that the article was newsworthy. Instead, she proffered evidence that there was never any actual incident and that the article was entirely fictitious, from the non-existent "letter to the editor" to the irresponsible advice given under the guise of professional therapy.

(as prophesized by Judge Bellacosa's dissent, *Messenger IV*, 94 N.Y.2d at 449) upon a Constitutionally impermissible basis. The apparent violation of this Court's confidence in the ability of the New York courts to follow the constitutional command, and the deleterious consequences to the rights of private citizens in the Internet Age, is critically at issue in this petition.

A. Factual Predicates for Petitioner's Claim

In 1995, fifteen year old petitioner thought she had the same rights as Julian Spahn to bar the publication of what "*purport*[*ed*] to be [her] biography." *Spahn v. Julian Messner, Inc.*, 18 N.Y.2d 324, 328 (1966) ("*Spahn*").[5] She thought she had the same protections as the Hill family in *Time Hill* to obtain redress for emotional distress for the publication by a media defendant of a calculated falsehood about her. Apparently, however, she was wrong.

Pictures of petitioner were published in an article purporting to be about her non-consensual sexual affair with three men while she was intoxicated, leaving her possibly pregnant and potentially carrying a sexually transmitted disease. The article was not a general article about a topic, it was a purported letter to the editor from a single individual — petitioner. The letter purported to be Jamie's autobiography.[6]

The article is entitled: " I got trashed and had sex with three guys." It employs standard journalistic tools to identify the petitioner as the author of the purported letter to the editor, and as the person speaking to the editor, and hearing the editor's responses:

> "Wake up and face the facts: You made a pretty big mistake" [picture]

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5. Full history: *Spahn v. Messner*, 43 Misc. 2d 219, 250 N.Y.S.2d 529 (N.Y. Sup. Ct.), *aff'd*, 23 A.D.2d 216, 260 N.Y.S.2d 451 (1st Dep't 1965), *aff'd*, 18 N.Y.2d 324, 274 N.Y.S.2d 877 (1966), *aff'd on remand*, 21 N.Y.2d 124, 286 N.Y.S.2d 832 (1967). *Spahn* was determined after remand following this Court's determination of *Time Hill*.

6. The article in issue is appended as Appendix F.

"Even though you made a major mistake this time" [article]

"Afraid you're pregnant? See a doctor" [*picture*]

"*You* also need to see a doctor right away" [article]

"Don't try to hide — just ditch him and his friends" [picture]

"You deserve a lot better than him. In other words, its time to dump this zero — like yesterday" [article]

Yet petitioner never wrote such a letter. Petitioner never had such a sexual affair. Petitioner was never intoxicated and then involved in group sex. Petitioner never had any of the emotions that the article attributes to her. Indeed, none of this purported "autobiography" was true.[7]

Petitioner's autobiography was much simpler. She was a beautiful, aspiring model. She was just a child trapped in a reckless world of falsehoods paraded under the guise of "news."

Respondent publisher of the offensive article, stipulated that it never received parental consent. Indeed, respondent never sought consent, despite many consent forms in its possession.

At trial, defendant's Art Director admitted that Jamie was "supposed to be" the subject of the autobiography, and that he highlighted the word "sex" in the article because readers were interested in sex, and liked to read about sex.

By stipulation of the parties, the jury was charged under the standards articulated under *Chapadeau v. Utica Observer Dispatch, Inc.*, 38 N.Y.2d 196, 379 N.Y.S.2d 61 (1975) and returned a verdict in Jamie's favor on this basis. (Appendices G and H.)

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7. "As was found by the trial court, the book was replete with imaginary incidents, invented dialogue, dramatized portrayals and manipulated chronologies." *Messenger III*, 94 N.Y.2d at 445. The Court of Appeals was referencing *Spahn;* the **identical** finding is applicable here.

The jury found that the reasonable reader of this publication (12 to 19 year olds) believed that the story was Jamie's autobiography. (Appendix H.)

The jury also found that the respondent acted with gross irresponsibility in creating this belief, because the article was replete with publishing practices incorporated to successfully create the misimpression in the reader's mind that petitioner had submitted her autobiography for publication, in search of sound advice.[8]

Petitioner's emotional injury proximately caused by defendant's calculated falsehood was determined by the jury to be $100,000. The jury awarded nothing for reputational injury or economic loss. (Appendix H.) A defamation claim would have resulted in zero recovery.[9]

Petitioner also cross-appealed the District Court's refusal to admit evidence relevant to, and charges to the jury concerning, punitive damages and the fictionalization of the entire letter to the editor and advice. This refusal failed to consider the wealth of evidence that respondent's use of petitioner's photographs without prior written consent was not only "knowing" (the judicial standard twice articulated by the Court of Appeals)[10]

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8. The advice, however, was not even written by the editor, although carrying her picture as her signature. Indeed, no one at defendant's offices would take credit for the alleged "advice." Jamie sought to proffer evidence of the gross irresponsibility of the advice tendered, but the District Court refused to admit such evidence.

9. The jury's finding that petitioner suffered no economic loss or reputational injury is the death knell to defamation. Thus, absent the protections afforded under the Statute, petitioner would be without recourse.

10. *Cohen v. Hallmark Cards, Inc.*, 45 N.Y.2d 493, 410 N.Y.S.2d 282, 382 N.E.2d 1145 (1978) (actual knowledge or reckless disregard for the absence of written consent to use plaintiff's pictures held to be the standard); and *Welch v. Mr. Christmas, Inc.*, 57 N.Y.2d 143, 454 N.Y.S.2d 971, 440 N.E.2d 1317 (1982) (neither malice nor recklessness need be shown for recovery of exemplary damages under the Statute).

but that respondent intentionally, willfully and fraudulently induced petitioner to pose for the fabricated article, designed to depict petitioner in a salacious manner, simply to boost readership at her expense.

B. The Critical Nature of this Petition

The petitioner raises important First and Fourteenth Amendment questions of whether all publications that are labeled "newsworthy" can be, in whole cloth, excluded from the provisions of the Statute, and thereby immunized from liability in the State of New York. (*See, e.g.*, the *Amicus Curiae* Brief submitted by the Screen Actors Guild) (*See* App. I). The Court of Appeals below stated:

> Second, we have made clear that these sections [the Statute] do not apply to reports of newsworthy events or matters of public interest (*see, e.g., Howell v. New York Post Co.*, 81 N.Y.2d 115 (1993); *Stephano* v *News Group Publs.*, 64 N.Y.2d 174, 184 (1984)).

Messenger IV, 94 N.Y.2d at 441.

This Court has held that the ruling in *Sullivan* applies to liability under the Statute in "parallel." *Gertz v. Welch*, 418 U.S. 323 at 334-335 n.6 (1974). Yet, the courts below have ignored the holding of *Gertz* which determines the gamut of First Amendment protection afforded the press based upon the individual's "*participation in the particular controversy giving rise to the defamation,*" *Gertz, supra* at 352, rejecting the Circuit Court's finding that the matter was of "significant public interest." In the case at bar, petitioner has absolutely no participation in the subject matter, especially since the matter was pure fiction.

In establishing immunity for photographs juxtaposed with text, the Court of Appeals indicated that it found no "inherent tension" between the *Spahn* holding of liability for intentional fictionalization of written words without photographs, and the *Arrington*[11] line of cases in which stock photographs were

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11. *Arrington, Howell, Finger* and *Murray.*

employed with newsworthy text. It is clear that the distinction is but of recent creation by the New York courts in their attempt to create a safe haven for the media by dodging the mandates of *Sullivan, Time Hill* and *Gertz.*

Moreover, the courts below appear to ignore the jury instructions and findings (see Appendices G & H) and the fact that they were predicated upon the *Chapadeau* standard. *See also Kaelin v. Globe International*, 162 F.3d 1036, 1040 (9th Cir. 1998).

The jury found that the case at bar does not involve mere juxtaposition of photographs and text. Rather, journalistic tools have been employed to create the impression that petitioner is speaking the quoted words, hearing the quoted responses, and living the story outlined in the article. Accordingly, the jury, when instructed under *Chapadeau*, found that ordinary readers would believe that the article was about the petitioner and that this belief was created with gross irresponsibility. These standards were never employed in the *Arrington* line of cases, as those cases involved a still photograph and nothing more.[12]

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12. *Arrington, Howell, Finger* and *Murray* each demonstrate the "external and objective criteria" used to evaluate a newsworthy article where the individual whose picture is employed, is *not* identified. Additionally, *Finger* pictured a healthy family of six with the "subject of caffeine-enhanced in vitro fertilization." *Arrington* showed a man of color in connection with an article about middle class people of color. *Murray* shows a picture of the plaintiff taken while he was attending the St. Patrick's day parade, in connection with an article about the parade. *Howell* showed the "incidental use" exception in connection with plaintiff's photograph together with Hedda Nussbaum, which had in fact occurred in public. Moreover, these cases all presented photographs in which no quotes were emanating from plaintiff's mouth, no journalistic tools were used to suggest a first person autobiographical narrative, and the subject matter was clearly real, not defamatory, and not salacious. There can be no "implication" without direct statements and/or extrinsic evidence that the photographs were " of and concerning" the parties whose photos were taken. *Rosenblatt v. Baer*, 383 U.S. 75, 81, 82 (1966). Therefore, the evidence was "constitutionally insufficient

(Cont'd)

Yet, the courts below ignored the standards imposed upon the jury and its findings of gross irresponsibility in falsely identifying petitioner with a fictional account. In essence, then, the courts below have created absolute immunity.

Additionally, the petitioner here is an aspiring model, and thus has a cognizable property interest in the use of her likeness. Property interests have been at the heart of invasion of privacy cases whether or not the privacy is protected under common law or by statute, and whether or not the person is a public figure. *The Right of Privacy*, by Warren and Brandeis, 4 Harvard Law Rev. p. 193 (1890). Under the Statute, the prevailing party's claim inevitably involves a property interest and/or a breach of contract. Thus the Statute merges the recognized doctrine of "commercial exploitation." *Binns v. Vitagraph*, 210 NY 51 (1913); *Time Hill, supra,* 385 U.S. at 386 *quoting Spahn, supra*, 18 N.Y. 2d at 328. *See also Flores v. Mosler Safe Co.*, 7 N.Y. 2d 276, 280-281 (1959); *Brinkley v. Casablancas*, 80 A.D.2d 428, 432 (1981).[13]

The media defendant at bar also falsely represented to petitioner's modeling agency, to induce them to provide petitioner for the photo shoot, that the pictures would be used in a positive manner for a "nice little story." The "story" was

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(Cont'd)
to support" a finding that the articles referred to those four plaintiffs in a manner that violated their constitutional rights to privacy and publicity. *Sullivan, supra*, 376 U.S. at 292. Lastly, there was no contract or property interest involved in those four cases.

13. A writer cannot be permitted to publish a libelous book and exploit a commercial profit by using someone's name to sell the merchandise. This type of commercial fraud was heretofore governed by the Statute. *See* Comments: *The Right of Privacy: Normative-Descriptive Confusion in the Defense of Newsworthiness*, University of Chicago Law Review, Vol. 30, p. 722 at 727 n.20 citing N.Y. Civ. Rights Law §§ 50 & 51 (1963). The New York statute on the right of privacy "has the same practical effect as the property theory." *The Right of Privacy A Half Century's Developments*, 39 Michigan Law Review, 526 at 538 (1941) Louis Nizer.

obviously not "nice" but instead blatantly false. The photographs had improper "statements" attached to them, in contravention of the prior representations. This is "sufficient evidence" to permit the jury to conclude that the article was "specifically directed" by and/or "identified" petitioner. *Rosenblatt, supra*, 383 U.S. 75 at 84, 85 (1966). Indeed, the jury below so found.

Yet, the courts below have treated these jury findings as if they are irrelevant. Indeed, if there is absolute immunity without any jury question ever raised, as is the logical extension of the decisions below, then this Court's consistent rulings to the contrary have been — overruled. *Time Hill, supra*, 385 U.S. at 394, note 11 ("it is for the jury, not for this Court, to determine whether there was knowing or reckless falsehood").

Moreover, *Sullivan* made certain to discuss the historical nature of the freedom of the press, and separated the rights of public officials from those of private citizens. Since the creation of the First Amendment, it has been recognized that although public officials have no Constitutional rights to sue the press for libel and/or invasion of privacy, private citizens have retained such rights. *Respubica v. Oswald*, 1 Dallas, 319, 325 (1788); *Commonwealth v. Blanding*, 3 Pick 304, 313, 314, 20 Mass 304 (1825). Indeed, the dissent in *Gertz* suggests that a private party should have no hurdle upon demonstrating that the private party had been defamed or privacy had been invaded. *Gertz, supra*, 418 U.S. at 380-388. Petitioner is such a private citizen.[14]

Yet, instead of having a lighter burden of proof then a public figure (or a newsworthy figure like *Time Hill*), the courts below have raised the bar and immunized the media altogether. This is especially incorrect since the petitioner in fact met the *higher* standard of gross irresponsibility, as shown by the jury

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14. Moreover, the article in issue cannot be deemed "hot news" warranting protection under the First Amendment. *Rosenbloom v. Metromedia*, 403 U.S. 29, 40, 46 (1971). Nor is it "current news." *See Humiston v. Universal Film Manufacturing Co.*, 184 A.D. 467 at 469 (1919); *Hagler v. Democratic News*, 699 S.W.2d 96, 99-100 (1985) (police raid).

instructions and findings. (Appendix H.) Rather than recognize the findings by the jury under this higher standard, the courts below have instead created a rule *inverse* to that of *Gertz* — that the media has absolute immunity in using the photographs of a private citizen.

Finally, the question of "newsworthiness" should remain predominantly a question of federal law. This Court has stated that issues stemming from *Sullivan* which raise the First and Fourteenth Amendments, are of national "scope" to be determined by this Court. "The standards that set the scope of its principles cannot therefore be such that "'the constitutional limits of free expression in the Nation vary with state laws.' " *Rosenblatt, supra*, 383 U.S. at 84, 85, *quoting Pennekapp v. Florida*, 328 U.S. 331, 335 (1946). *See also Sullivan, supra*, 376 U.S. at 270.

"An independent examination of the whole record" by this Court is proper" so as to ensure [this Court] that the judgment does not constitute a forbidden intrusion on the field of free expression." *Sullivan, supra,* at 285, *quoting Edwards v. South Carolina*, 372 U.S. 229, 235 (1963); *also see, e.g., Wolston v. Reader's Digest Assn. Inc.*, 443 U.S. 157, 166, 168 (1979). The evidence in the record provides the "high degree of . . . probable falsity demanded by the New York Times." *Beckley Newspapers v. Hanks*, 389 U.S. 81, at 84 (1967), *quoting Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); *also see Sullivan, supra*, 389 U.S. at 285.

C. The Proceedings Below

On February 23, 1998, *Messenger I* was decided by the District Court upon respondent's motion for summary judgment. The jury's verdict was presented on March 27, 1998. (*See* Appendix D.)

On April 28, 1999, *Messenger II* was decided by the Circuit Court by way of the presentation of the following certified questions to the Court of Appeals:

> 1. May a plaintiff recover under New York Civil Rights Law §§ 50 and 51 where the defendant uses

> the plaintiff's likeness in a substantially fictionalized way without the plaintiff's consent, even if the defendant's use of the image was in conjunction with a newsworthy item?[15]
>
> 2. If so, are there any additional limitations on such a cause of action that might preclude the instant case?

Messenger II, 175 F.3d 262, 266.

After accepting certification on June 8, 1999 (*Messenger III*), on February 17, 2000, *Messenger IV* was decided by a *per curiam* majority vote of the Court of Appeals, with a dissenting opinion by Judge Bellacosa.

On February 28, 2000, *Messenger V* was decided and the judgment of the District Court was vacated. The case was thereupon remanded to the District Court, and this petition timely filed.

REASONS FOR GRANTING THE WRIT

I. BY IMMUNIZING PHOTOGRAPHS FROM ALL OTHER FORMS OF SPEECH IRRESPECTIVE OF CONTENT AND INTENT, AND FINDING NO INHERENT CONSTITUTIONAL TENSION, THE COURTS BELOW HAVE VIOLATED THE FEDERAL CONSTITUTIONAL COMMAND.

In *Time Hill*, this Court reviewed the New York Courts' interpretation of the Statute in connection with a publication that involved photographs of the Hill family interwoven or juxtaposed with a small amount of text which created the false impression that the story was about them. In distinction, in

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15. The question begs the issue of newsworthiness. Indeed, the manner in which the question was framed by the Circuit Court rendered "newsworthiness of the item" a given, even though that was never a finding by the District Court, nor an admission by the petitioner. Rather, the petitioner argued, and continues to argue, that a fictitious article can never be "newsworthy." But since the rhetorical question was asked in that manner, the Court of Appeals improperly believed in the admission of newsworthiness, and bootstrapped its decision about this false proposition.

Messenger, the courts below immunized photographs interwoven and juxtaposed with a small amount of text that created the false impression that the story was about her.

In *Time Hill*, this Court established the standard for liability to be "knowledge of the falsity or in reckless disregard of the truth." *Time Hill, supra*, 385 U.S. at 388. This Court made clear that "where either result finds reasonable support in the record it is *for the jury*, not for this Court, to determine whether there was knowing or reckless falsehood." *Time Hill, supra*, 385 U.S. at 394 ft. note 11, emphasis added.

The *Messenger* jury found the respondent to have had knowledge of the falsity or reckless disregard for the truth. The jury determined that the ordinary reader would incorrectly believe that the article concerned and identified the petitioner, and that the media defendant acted with gross irresponsibility in creating that impression.

Yet, the Circuit Court and Court of Appeals made no mention of the jury's findings, nor the standard articulated by this Court in *Time Hill*.

Had *Time Hill* originated now, the New York courts would have summarily adjudged the media defendant free of liability, as if this Court had never spoken on the issue.[16]

By all appearances, the Circuit Court and Court of Appeals holdings, at odds with *Time Hill*, are constitutionally unsound.

In *Time Hill*, this Court clearly stated that the First Amendment as applied to the Statute will not shield a media defendant from liability for its calculated and/or knowing falsehoods. *Time Hill, supra*, 385 U.S. 389-390. How, then, can it be that the New York Courts have created such a shield in *Messenger*?

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16. On May 2, 2000, relying upon *Messenger IV*, the Southern District of New York summarily dismissed a claim under the Statute in connection with a television show. *Weber v. Multimedia Entertainment, Inc., et al.*, 97 Civ. 0682, 2000 U.S. Dist. LEXIS 5688 (2000).

The answer lies in the New York Court's synthesis of a different standard:

> Thus, it is clear that a Civil Rights Law §§ 50 and 51 claim does not lie where a plaintiff's photograph is used to illustrate a newsworthy article. There are two limitations: first there must be a real relationship between the article and the photograph . . . and second, the article cannot be an advertisement in disguise.

Messenger IV, 94 N.Y.2d at 444.

In other words, if the photographs appear to reasonably relate to the article, and the article does not appear to be an advertisement (*e.g.*, "buy XYZ beer") then, in the *Messenger* Court's view, there is no liability under the Statute. The problem, of course, is that any good editor will select a photograph that illustrates the article. Indeed, the desire is to connect the photograph with the text. This is precisely the testimony in the case at bar. The intent was to create the false impression that the article was about the person pictured. Obviously, then, there is a "real relationship" to the extent there is an illustration, even if the underlying implication is not real.

Messenger IV then notes (94 N.Y.2d at 444):

> Of course, a Civil Rights Law claim may lie if a plaintiff's picture is issued purely for trade purposes, and not in connection with a newsworthy article.

This convoluted paradox implicates Constitutional concerns. Between the Circuit Court and the Court of Appeals, apparently, the entire position of petitioner was lost. Petitioner *always* argued that the calculated falsehood of the defendant created liability under the "trade purposes" prong of the Statute. It would appear that the Circuit Court and Court of Appeals have acknowledged the principal, but ignored the result. It is logically impossible to find that the article was false, on the one hand, but to hold that it is newsworthy on the other. Apparently, however, the Circuit Court and Court of Appeals have done so.

The Circuit Court presented the certified question in a manner that misstates the facts and law by asking whether falsification may be a standard for "a newsworthy item." The error in the question also created an error in the answer. As indicated above, the petitioner has never admitted, nor did the District Court find, that the article was newsworthy. Rather, both agreed that the *subject matter* of teenage sex and alcoholism were newsworthy. This cannot boost a false story about a child's purported experiences with teenage sex and alcoholism into news. A completely invented story that falsely holds itself out as real, and incorrectly identifies petitioner as having sexual encounters with multiple partners and alcohol abuse, followed by potential pregnancy and diseases, cannot be treated with the same immunity as "news." False and fictional stories have never been news in the State of New York since *Binns* and *Spahn*. Until now.

The original standard, eroded away by the New York Courts, actually involved the question of whether the publication identified the person, and whether such identification was made with the requisite knowledge of the falsity when published. *Sullivan*, *supra*, 376 U.S. at 279-280; *Time Hill*, *supra*, 385 U.S. at 387-388. In *Time Hill*, this Court was careful to apply the same rules of *Sullivan* for "breathing space" supporting "free debate" of extreme value to our democracy. *Sullivan*, *supra*, at 271-272; *Time Hill*, *supra*, at 388-389. Yet blatant falsehoods about someone cannot, by definition, have such value.

Even assuming application of the "real relationship" standard, the definition of "real relationship" as applied by the Court of Appeals to the case at bar is Constitutionally vague. *Messenger IV*, 94 N.Y.2d at 442-443; *Coates v. City of Cinncinati*, 402 U.S. 611, 614 (1971). The misuse of photographs by placing false quotes indicating that the words are emanating from the person's mouth in the photograph, as contrived by respondent, is not "real," let alone sufficient for the term "real relationship."

Given these directives, the Circuit Court and Court of Appeals have, *inter alia*: (i) enhanced newsworthiness to uncharted territories inconsistent with this Court's rulings and interpretation of the First and Fourteenth Amendments; (ii) made it impossible for a private citizen to be protected from mental anguish resulting from the misuse of photographs connected with text in a manner that falsely identifies the citizen as the subject matter of the text; and (iii) separated the First Amendment analysis of speech based upon the medium of expression, irrespective of content and intent.

II. THE ARTICLE CANNOT BE CONSTITUTIONALLY IMMUNIZED FROM LIABILITY UNDER THE STATUTE AS ALLEGEDLY "NEWSWORTHY" BECAUSE ITS PUBLICATION FALLS UNDER THE TRADE PURPOSES PRONG OF THE STATUTE, CASE AUTHORITY, AND THE LEGISLATURE'S SILENT ADOPTION OF THE STANDARD.

The Statute embraces two specific prongs: trade purposes and advertisement in disguise. The definition of the initial aspect was first set forth by the Court of Appeals in 1913, in *Binns*. The "real relationship" test actually bridges the two:

> The last picture of the series had no connection whatever with any other place or person with any event. His alleged personal movements as exhibited in the now-well form of moving pictures had no relation to the other pictures, and it was not designed to instruct or educate those who saw it.

Binns v. Vitagraph Co., 210 N.Y. 51, 58 (1913). *See also Humiston v. Universal Film Manufacturing, Co.*, 189 App. Div. 467, 471, 178 N.Y.S. 752 (1919); *Lahiri v. Daily Mirror*, 162 Misc. 776, 782 (1937) ("the statute is violated if the photograph is used in connection with an article of fiction").

> We hold that the name and picture of the plaintiff were used by the defendant as a matter of business and profit and contrary to the prohibition of the

> statute. It is urged that there is danger of serious trouble in the practical enforcement of any rule which may be adopted in construing and enforcing the statute so far as it relates to purposes of trade. If there is any basis for the suggestion of danger in enforcing a part of the statute under consideration it is the duty of the legislature to repeal such part thereof, or so modify it as to define with greater particularity what it intends to be prohibited.

Binns, *supra*, at 58-59.

The Legislature declined the suggestion by the Court of Appeals to eliminate the standard that a "trade purposes" usage includes falsification of a newsworthy topic. Since 1913, the Legislature has twice amended the Statute (1983 and 1995). In neither instance has the operative language been eliminated. Neither the sale of photographs by third parties nor the inclusion of "voices" in the amendments are relevant to the case at bar. [Amendments: 1983, 1995.]

Accordingly, the Legislature's refusal to modify the Court of Appeals definition of "trade purpose" is a tacit adoption by the Legislature of the standards articulated in the *Binns* decision. This is particularly germane where, as here, the Court itself stated that it was the Legislature's "duty" to modify, or adopt by silence. *See Uniformed Firefighters Assn. v. Beekman*, 52 N.Y. 2d 463, 472 (1981); *also see stare decisis* doctrine of Legislature's acceptance of case precedent after amendment, *e.g.*, *Ankenbrandt v. Richards*, 504 U.S. 689, 700 (1992) *citing Patterson v. McLean Credit Union*, 491 U.S. 164, 172-173 (1989); and *Lorrilard v. Pons*, 434 U.S. 575, 580 (1978).

Thus, the District Court's adoption of the standard applied by *Binns* is in accord with the Legislative intent, while the Circuit Court and Court of Appeal's standards are not.

III. THE TRADE PURPOSES STANDARD, AS PROPERLY APPLIED BY THE DISTRICT COURT, CANNOT BE OVERRULED BY THE CIRCUIT COURT AND COURT OF APPEALS WITHOUT VIOLATING PETITIONER'S CONSTITUTIONALLY RECOGNIZED AND PROTECTED PROPERTY INTEREST IN HER VALUABLE COMMERCIAL LIKENESS.

Binns, *Spahn*, *Time Hill*, *Brinkley*, *Pollard*, and *Messenger* each involve the same constitutionally protected property interests. Here lies the crucial "consideration of factors" or "other requirements of the statute" that are essential for raising a cause of action under the Statute. *Time Hill*, *supra*, 385 U.S. at 390; *Spahn*, *supra*, 21 N.Y. 2d at 127.

This Court reiterated the threshold for implicating the Statute in *Time Hill*, as follows:

> The statute was enacted in 1903 following the decision of the Court of Appeals in 1902 in *Roberson v. Rochester Folding Box., Co.*, 171 N.Y. 538, 64 N.E. 442. . . . It was grounded upon an alleged invasion "of privacy," defined by the Court of Appeals to be "the claim that a man has the right to pass through this world, if he wills, without having his picture published . . . or his eccentricities commented upon either in handbills, circulars, catalogues, periodicals, or newspapers." 171 N.Y. at 554. The Court of Appeal traced the theory to the celebrated article of Warren and Brandeis, entitled *The Right to Privacy*, published in 1890. 4 Harv. L. Rev. 193.

Time Hill, 385 U.S. at 380. *See also Binns*, *supra*, 210 N.Y. at 55; *Spahn*, *supra*, 18 N.Y. 2d at 327; *Arrington*, *supra*, 55 N.Y. 2d at 435; *Finger*, *supra*, 77 N.Y. 2d at 141.

The intent of the legislature is best determined at the time the Statute is enacted. *Colonial Liquor Distributors v.*

O'Connnel, 295 N.Y. 129, 141 (1946). *See also Beers v. Hotchkins*, 256 N.Y. 41, 58 (1931); *Donahue v. Warner Bros., Pictures Dist. Corp.*, 2 Utah 2d 256, 272 P. 2d 177 (1954); and *Sutherland Stat Const.* §§ 49.08, 5th Ed.

Roberson made clear to the legislature that a civil/criminal statute was needed to cover two sets of situations. First was the need to cover improper advertisements by the use of photographs without the consent of the party who was filmed. The court reasoned that such use was improper if a property interest was being usurped. *Roberson, supra*, 171 N.Y. at 538. The second was to bar libel in the use of such photography. *Id.* at 557. *See also Humiston v. Universal Manufacturing Co.*, 189 A.D. 467, 472 (1st Dept. 1919).

Roberson relied on six English cases discussed by the leading authority on the subject. *Roberson, supra*, 171 N.Y. at 548-550; *The Rights of Privacy*, by Warren and Brandeis, 4 Harvard Law Review, p. 193 at 207-211 (1890). Those cases each relied on a property interest and/or breach of an implied contract. *Roberson, supra*, 171 N.Y. at 548-550.

One of those cases, *Pollard v. Photographic Co.*, L.R. 40 Ch. Div. 345 (J. North) is still of import. *Pollard* concerned whether a photographer who entered into a contract with plaintiff was barred from using her pictures for a profit. The Court found in favor of plaintiff, and enjoined the photographers' use of the photographs. Warren and Brandeis, who discuss the significance of the *Pollard* case at length, state, in relevant part:

> Of key import was that "Mr. Justice North integrated in the argument of the plaintiff's counsel the inquiry: " 'Do you dispute that if the negative likeness were taken on the sly, the person who took it might exhibit copies?' " and counsel for the plaintiff answered: " 'In that case there would be no trust or consideration to support a contract.' "

4 Harvard Law Review, at 208-209.

Later, the defendant's counsel argued that " 'a person has no property interest in his own features: short of doing what is libelous or otherwise illegal, there is no restriction on the photographer's using the negative.' " As noted by Warren and Brandeis:

> But the court, while expressly finding a breach of contract and/or trust sufficient to justify its interposition, still seems to have felt the necessity of resting the decision also upon a right of property in order to bring it within the line of those cases which were relied upon as precedent.

Warren and Brandeis, *supra*, at 209-210.

At page 209 ft. note 1 of Warren and Brandeis, *supra*, the concept of implied contracts and breach of confidentiality are discussed by Judge North at length:

> In conclusion Judge North states: "the phrase 'a gross breach of faith' used by Lord Justice Lindley in *Jack v. Priester*, 19 Q.B.D. 639 applies with equal force to the present, when a lady's feelings are shocked by finding that the photographer she has employed to take her likeness for her own use is publicly exhibiting and selling copies thereof."

North J., in *Pollard v. Photographic Co.*, 40 Ch. D. 345, 349-352 (1888).

Significantly, *Roberson* did not entail a prior contractual relationship between the photographer and the party whose picture was exploited. In distinction, however, the case at hand in fact involves pre-existing contractual and confidential duties that were breached by using the photographs in a manner inconsistent with the representations made to petitioner's modeling agency in inducing the agency to provide her, an underage model, at the shoot from which the photographs were obtained. Indeed, the "nice little couples story" that respondent represented to be the anticipated use somehow unilaterally became the salacious story in which the photographs were

actually used. The agency testified that had they been advised of the actual use in advance, petitioner would never have been sent on the shoot. Thus, the breach of contract issues, extant in *Pollard* and relied upon by Warren and Brandeis are raised in the case at bar. Unfortunately, however, the District Court, Court of Appeals, and Circuit Court gave short shrift to these historically underlying principles.

Accordingly, the failure of the courts below to recognize the principles of breach of contract, coupled with the fact that they failed to recognize and protect petitioner's image and livelihood dependent therefrom, is fatally incorrect.

The existence of the contractual underpinnings for the principles have also been recognized by the New York Courts prior to their departure from the rules enunciated in *Time Hill*. For example, the Appellate Division in *Binns* clearly recognized that Mr. Binns and the filmmaker of "saved by the Wireless" had a contractual relationship. *Binns v. Vitagraph*, 147 A.D. 783, at 786 (1st Dept. 1911). "He concedes that his name was to be used, and the show was to be and was in fact advertised as his own exhibition." *Id.*, 147 A.D. at 786. Therefore, there was an implied and or express contract between Mr. Binns and the owner of the film theater to use the photographs only as it related to the rescue by Mr. Binns

In addition, Warren Spahn is a famous baseball pitcher whose public figure status is well known. As such, he has the "additional light shed on this conduct in public." *Spahn*, 18 N.Y.2d at 328.

A public figure such as Warren Beatty, Heather Locklear, or Warren Spahn, lose their expectation of privacy and or property interest to the "unauthorized publication of his [or her] biography." *Spahn*, *supra*, 18 N.Y.2d at 328 (1966). Their "biography" lies outside the protection afforded by the Statute. Just like newsworthy events, however, this does not extend to what "purports to be his [or her] biography." *Id.*, 18 N.Y.2d at 328. A public figure retains an interest to the truthful publication

of his life. The same holds true to reporting news. "The fictitious" comes within the zone of the Statute. *Id.*, 18 N.Y.2d at 328.

The right of publicity is subsumed by the Statute, which includes within its scope of violations the commercial exploitation of the image and or property interest of the plaintiff that is directly linked to her livelihood. *See Brinkley v. Casablanca*, 80 A.D.2d 428, at 435-436 (1st Dept. 1981), citing *Haelan Labs v. Topps Chewing Gum*, 202 F. 2d 866, 869 (1953), *cert. denied*, 346 U.S. 816 (1953). *See also Guglielmi v. Spelling Goldberg Productions*, 25 Cal. 3d 860 at 864, 160 Cal. Rptr. 352, 603 P.2d 454 (1979).

It is crucial to note that the court found a cause of action in *Brinkley* because Casablancas, the president of Elite Model Management, had an agreement with the plaintiff which had been violated. "Under the agreement, Casablancas was obliged to furnish the model's photographs from which Galaxy would produce the posters. Galaxy's right to print, publish and vend the posters was conditioned upon Casablanca's obtaining the consent of the model's." *Brinkley, supra*, 80 A.D.2d at 429.

Key to the court's analysis in *Brinkley* was the recognition that she

> never authorized distribution of the particular photograph or poster. While she undoubtedly permitted photographs of herself to be taken which might be used on a poster for commercial sale, she reserved the right, prior to their commercial exploitation, to reject or approve the use to which the photographs would be put. As already noted, a model's photograph is customarily used only after a written release has been obtained.

Id., 80 A.D.2d at 434. Therefore, *Brinkley* was a classic breach of contract case with the defendants usurpation of commercial profit from the image of Ms. Brinkley.

The right to "earn a living" and to pursue a cause of action under the right of publicity, cannot be undermined by a wrongful extension of First Amendment immunity. Where, as here, a court below has incorrectly barred liability under a similar statute in Ohio, this Court has corrected the wrong, and reversed the decision to thereby impose liability, finding that the First Amendment cannot be used to immunize a media defendant where his right of publicity is at stake. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 at 574 (1977).

IV. THE ISSUES RAISED ARE FEDERAL AND CANNOT VARY AMONG THE STATES; THE WRIT SHOULD BE GRANTED TO MAINTAIN UNIFORMITY.

There is a significant variance between "hot news" newsreels or "current news" compared to matters that are outside the penumbra of First Amendment protection. The article before this court is not "hot news" as found in 1971 with the action of a police raid. *Rosenbloom, supra*, 403 U.S. at 40, 46; *Hagler v. Democratic News*, 699 S.W.2d 96, 99-100 (1985).

The antithesis was found by this court in *Gertz*. This Court did not find the matter to be of "significant public interest" as the plaintiff did not "thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome." *Gertz, supra,* 418 U.S. at 352. *See also Wolston v. Reader's Digest Assn. Inc.*, 443 U.S. 157, 166-169 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111, 133-136 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448, 451-455 (1976).

Petitioner, unlike Mr. Hill in *Time Hill* or the public officials in *Sullivan*, cannot be conceived to be a public figure whether involuntary or voluntarily exposed to public scrutiny. *Khawar v. Globe International*, 19 Cal. 4th 254, 965 P.2d 696, 701, 702 (1998).

The N.Y. Court of Appeals has recognized the import of "current news" in the context of the Statute. In 1959, that Court had before it a photographic "physical juxtaposition" of an old newsworthy item that was used to advertise a product for safety. *Flores v. Mosler Safe Co.*, 7 N.Y.2d 276, 280 (1959). That Court made clear to distinguish *Flores* with *Wallach*, a similar case save for the timing of the news. In the former, the event was "outdated" news, whereas the latter was "current." *Id.* at 282, distinguishing, *Wallach v. Bacharach,* 192 Misc. 979 (1948), *aff'd,* 274 App. Div. 919 (1948).

Similarly, in 1919 the N.Y. Appellate Division made certain to protect movies that were being shown in the movie theaters on a weekly basis. The Appellate Court reviewed the intent of the legislature and found that the "statute does not apply to the publication of a picture or name in a single set of films of actual events issued at one time for distribution in different parts of the country before different audiences as a matter of current news" (Emphasis added.) *Humiston v. Universal Film Manufacturing, Co.,* 189 App. Div. 467 at 474 (1919).

The case at bar is significantly distinguishable. The type of news recognized by this Court in *Rosenbloom* and *Time Hill* and by the Appellate Division in 1919 in *Humiston* can fairly be described as nearly identical. This is real news.

Fabricated soap operas for teenagers are not in the same category. The courts below are in error in making the article in issue immune from liability thereby giving the media the same type of First Amendment rights as current and actual ongoing events that are broadcasted by our newspapers and magazines. As heretofore stated, the issue is Federal in nature, and the state courts cannot abrogate to themselves the ability to modify the Federal Constitutional standards under the First Amendment in violation of this Court's command.

CONCLUSION

Petitioner respectfully prays that this Court grant this Petition and issue a writ of certiorari to review the judgment of the United States Court of Appeal of the Second Circuit in this matter.

Respectfully submitted,

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APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND DECIDED FEBRUARY 28, 2000

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 98-7767(L), 98-7865(XAP)

JAMIE MESSENGER, an infant under the age of eighteen, by her mother and "next friend" Donna Messenger,

Plaintiff-Appellee-Cross-Appellant,

v.

GRUNER + JAHR PRINTING AND PUBLISHING, also known as Gruner + Jahr USA,

Defendant-Appellant-Cross-Appellee,

and

SALLY LEE, as editor-in-chief of "YM, Young & Modern,"

Defendant.

Appeals from the United States District Court for the Southern District of New York

Decided: February 28, 2000

Appendix A

Before: MCLAUGHLIN, STRAUB, and KEITH, Circuit Judges.*

OPINION

PER CURIAM:

YM, Young and Modern, a magazine for teenage girls published by Gruner + Jahr Printing and Publishing, used Jamie Messenger's picture, admittedly without adequate consent, to illustrate its "Love Crisis" column in its June/July 1995 issue. The column, whose headline or "pull quote" was " 'I got trashed and had sex with three guys,' " included a letter from an author identified only as "Mortified." The author of the letter related the events described in the pull quote and sought advice from YM's editor on how to deal with the consequences. The editor responded that the author had made a "major mistake," suggested that she be tested for sexually transmitted diseases and pregnancy, and offered other advice. Messenger's mother brought this action on her behalf, arguing that Gruner + Jahr violated Messenger's statutory right of privacy under New York's Civil Rights Law, §§ 50 and 51, which permit recovery when "[a] person, firm or corporation . . . uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person. . . ." N.Y. Civ. Rights Law §§ 50, 51 (McKinney 1992). After a trial in the United States District Court for the Southern District of New York (Lewis

* The Honorable Damon J. Keith, of the United States Court of Appeals for the Sixth Circuit, sitting by designation.

A. Kaplan, Judge), a jury found in Messenger's favor, awarding her $100,000 in damages.

Gruner + Jahr appealed from the judgment, specifically arguing that the District Court erred in denying its motion for summary judgment because the use of Messenger's photographs fit within the broad definition of newsworthy material or material in the public interest. Because New York courts have consistently held that §§ 50 and 51 do not apply in circumstances involving newsworthy material or material in the public interest, Gruner + Jahr contended that it was entitled to judgment as a matter of law. The District Court denied the motion, concluding that New York courts have not permitted application of the newsworthiness exception in cases where the use "is 'infected with material and substantial falsity' " or fictionalization. See *Messenger v. Gruner + Jahr USA Publ'g*, 994 F. Supp. 525, 529 (S.D.N.Y. 1998) (quoting *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 132-33 (2d Cir. 1984), *cert. denied*, 471 U.S. 1054, 85 L. Ed. 2d 479, 105 S. Ct. 2114 (1985)). The District Court decided that because a reasonable jury might find that "the publication created the impression that Messenger had had the experiences that were the subject of the column," 994 F. Supp. at 528, the fictionalization limitation on the newsworthiness exception might apply and therefore summary judgment was not appropriate.

Though Gruner + Jahr raised several other issues in its appeal, and Messenger cross-appealed arguing that the District Court improperly limited her recovery, we decided that the central, dispositive issue in this appeal was whether a plaintiff can recover under New York's statutory right of

privacy, N.Y. Civ. Rights Law §§ 50 and 51, when a publisher uses the plaintiff's image in a substantially fictionalized way to illustrate a newsworthy piece. See *Messenger v. Gruner + Jahr Printing and Publ'g*, 175 F.3d 262, 264 (2d Cir. 1999). Because we believed this important issue to be an open one under New York law, we certified the following questions to the New York Court of Appeals:

> 1. May a plaintiff recover under New York Civil Rights Law §§ 50 and 51 where the defendant used the plaintiff's likeness in a substantially fictionalized way without the plaintiff's consent, even if the defendant's use of the image was in conjunction with a newsworthy column?
>
> 2. If so, are there any additional limitations on such a cause of action that might preclude the instant case?

Id. at 266.

The New York Court of Appeals has answered the first question in the negative, see *Messenger v. Gruner + Jahr Printing and Publ'g*, 2000 N.Y. LEXIS 75, No. 170, slip op., 2000 WL 190553 (N.Y. Feb. 17, 2000) (per curiam), attached as an Appendix to this opinion [omitted and attached in full, below], holding that "a Civil Rights Law §§ 50 and 51 claim does not lie where a plaintiff's photograph is used to illustrate a newsworthy article," subject only to two limitations: "first, there must be a real relationship between the article and the photograph . . . , and second, the article cannot be an advertisement in disguise." Id. at 10 (internal

citations omitted). The court also noted that "a Civil Rights Law claim may lie if a plaintiff's picture is used purely for trade purposes, and not in connection with a newsworthy article." Id. at [10]. Under this analysis, the Court of Appeals determined that, as plaintiff conceded, the "Love Crisis" column in this case was newsworthy, the photographs of Messenger bore a real relationship to the article, and the article was not an advertisement in disguise. See id. at [10-11]. Thus, the Court of Appeals concluded that Messenger could not recover under §§ 50 and 51, "regardless of any false implication that might be reasonably drawn from the use of her photographs to illustrate the article." Id. at [11]. Having answered the first question in the negative, the Court of Appeals determined that it need not address the second certified question. Id. at [17]. Likewise, we need not address the other issues raised in this appeal, which have been rendered moot by the New York Court of Appeal's decision.

Accordingly, we vacate the District Court's judgment and remand for further proceedings consistent with this opinion.

Appendix A

APPENDIX

COURT OF APPEALS
OF THE STATE OF NEW YORK

No. 170

JAMIE MESSENGER, an infant under the age of eighteen, by her mother and "next friend" Donna Messenger,

Plaintiff-Appellee-Cross-Appellant,

v.

GRUNER + JAHR PRINTING AND PUBLISHING, also known as Gruner + Jahr USA,

Defendant-Appellant-Cross-Appellee,

and

SALLY LEE, as editor-in-chief of "YM, Young & Modern,"

Defendant.

Decided: February 17, 2000

Before: KAYE, SMITH, LEVINE, CIPARICK, WESLEY and ROSENBLATT, Judges; Judge BELLACOSA dissents and votes to answer certified question No. 1 in the affirmative in an opinion.

Appendix A

OPINION

PER CURIAM:

Plaintiff, a 14-year-old aspiring Florida model, posed for a series of photographs in New York to appear in Young and Modern (YM), a magazine for teenage girls published by defendant Gruner + Jahr Printing. Plaintiff consented to the photo shoot, but YM did not obtain written consent from her parent or legal guardian. YM used the photos to illustrate the "Love Crisis" column in its June/July 1995 issue.

The column began with a letter to Sally Lee, YM's editor-in-chief, from a 14-year-old girl identified only as "Mortified." Mortified writes that she got drunk at a party and then had sex with her 18-year-old boyfriend and two of his friends. Lee responds that Mortified should avoid similar situations in the future, and advises her to be tested for pregnancy and sexually transmitted diseases. Above the column, in bold type, is a pull-out quotation stating, "I got trashed and had sex with three guys." Three full-color photographs of plaintiff illustrate the column — one, for example, shows her hiding her face, with three young men gloating in the background. The captions are keyed to Lee's advice: "Wake up and face the facts: You made a pretty big mistake;" "Don't try to hide — just ditch him and his buds;" and "Afraid you're pregnant? See a doctor."

Plaintiff brought this diversity action in the United States District Court for the Southern District of New York, alleging, among other things, that YM violated sections 50 and 51 of the New York Civil Rights Law by using her

photographs for trade purposes without obtaining the requisite consent. Defendants moved for summary judgment, arguing that they could not be held liable under the Civil Rights Law because the photographs had been used to illustrate a newsworthy column, the pictures had a real relationship to the article and the column was not an advertisement in disguise. Plaintiff conceded these facts but argued that the "newsworthiness" exception did not apply because the column and pictures together created the false impression that plaintiff was the author of the letter. The District Court denied summary judgment, holding that the newsworthiness exception does not apply where the juxtaposition of a photograph to an article creates a substantially fictionalized implication.[1] The court dismissed plaintiff's additional claims for defamation, intentional infliction of emotional distress, negligent infliction of emotional distress and negligence. Following trial on the Civil Rights Law claim, the jury awarded plaintiff $100,000 in compensatory damages.

Defendants appealed to the United States Court of Appeals for the Second Circuit, arguing that the

1. Plaintiff also sought to introduce evidence that the article itself was substantially fictionalized in that the letter had in fact been invented by YM's editorial staff. The District Court, however, barred plaintiff from exploring this subject at trial, holding that the only inquiry relevant to plaintiff's Civil Rights Law *§ 51* claim was whether the juxtaposition of the photographs to the article — not the article itself — was substantially fictionalized. The fictionalization alleged was that the use of the photograph in conjunction with the article conveyed the false impression that plaintiff was the author of Mortified's letter and had the experiences described in it.

newsworthiness exception barred recovery under the Civil Rights Law. The Second Circuit observed that New York had, in older cases, recognized a "fictionalization limitation" on the newsworthiness exception (see, e.g., *Spahn v Julian Messner, Inc.*, 21 N.Y.2d 124, 127, 286 N.Y.S.2d 832, 233 N.E.2d 840). The court noted, however, that our more recent cases have held that, where a photograph illustrates an article on a matter of public interest, the newsworthiness exception bars recovery unless there is no real relationship between the photograph and the article, or the article is an advertisement in disguise (see, e.g., *Finger v Omni Publications Intl.*, 77 N.Y.2d 138, 141-142, 564 N.Y.S.2d 1014, 566 N.E.2d 141). Uncertain whether Finger "signaled the end of the fictionalization limitation," the Second Circuit sua sponte certified to us the following two questions, which we accepted for review (*Messenger v Gruner & Jahr Printing & Publishing*, 93 N.Y.2d 948, 694 N.Y.S.2d 342, 716 N.E.2d 177):

> "1. May a plaintiff recover under New York Civil Rights Law *§§ 50* and 51 where the defendant used the plaintiff's likeness in a substantially fictionalized way without the plaintiff's consent, even if the defendant's use of the image was in conjunction with a newsworthy column?"
>
> "2. If so, are there any additional limitations on such a cause of action that might preclude the instant case?"

We answer the first question in the negative, and therefore need not reach the second.

Appendix A

Analysis

New York does not recognize a common law right of privacy (see, *Roberson v Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442; see also, *Wojtowicz v Delacorte Press*, 43 N.Y.2d 858, 860, 403 N.Y.S.2d 218, 374 N.E.2d 129). In response to *Roberson*, the Legislature enacted Civil Rights Law §§ *50* and 51, which provide a limited statutory right of privacy. Section 50 makes it a misdemeanor to use a living person's "name, portrait or picture" for advertising or trade purposes "without having first obtained the written consent of such person, or if a minor of his or her parent or guardian." Section 51 — relevant here — provides:

> "Any person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided [in section 50] may maintain an equitable action * * * to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use" (internal footnote omitted).

This Court has consistently restated several basic principles concerning the statutory right of privacy. First, recognizing the Legislature's pointed objective in enacting sections 50 and 51, we have underscored that the statute is to be narrowly construed and "strictly limited to nonconsensual commercial appropriations of the name, portrait or picture of a living person" (*Finger v Omni Publications, supra*, 77 N.Y.2d 138, 141; see also, Prosser,

Privacy, 48 Cal L Rev 383, 402-403). Second, we have made clear that these sections do not apply to reports of newsworthy events or matters of public interest (see, e.g., *Howell v New York Post Co.*, 81 N.Y.2d 115, 123, 596 N.Y.S.2d 350, 612 N.E.2d 699; *Stephano v News Group Publications*, 64 N.Y.2d 174, 184, 485 N.Y.S.2d 220, 474 N.E.2d 580). This is because a newsworthy article is not deemed produced for the purposes of advertising or trade. Additionally, these principles reflect "constitutional values in the area of free speech" (*Howell v New York Post, supra*, 81 N.Y.2d at 123).

Third, this Court has held that "newsworthiness" is to be broadly construed. Newsworthiness includes not only descriptions of actual events (*see, e.g., Freihofer v Hearst Corp.*, 65 N.Y.2d 135, 490 N.Y.S.2d 735, 480 N.E.2d 349 [details of matrimonial action]; *Gautier v Pro-Football, Inc.*, 304 N.Y. 354, 107 N.E.2d 485 [halftime show at football game]) but also articles concerning political happenings, social trends or any subject of public interest (see, *Beverley v Choices Women's Medical Center*, 78 N.Y.2d 745, 752, 579 N.Y.S.2d 637, 587 N.E.2d 275; *Stephano v News Group, supra*, 64 N.Y.2d at 184). Significantly, the fact that a publication may have used a person's name or likeness "solely or primarily to increase the circulation" of a newsworthy article — and thus to increase profits — does not mean that the name or likeness has been used for trade purposes within the meaning of the statute. Indeed, "most publications seek to increase their circulation and also their profits" (*Stephano v News Group*, 64 N.Y.2d at 184-185). Whether an item is newsworthy depends solely on "the content of the article" — not the publisher's "motive to

increase circulation" (*id.*, at 185; see also, *Freihofer v Hearst, supra*, 65 N.Y.2d at 141).

Applying these principles, courts have held that a wide variety of articles on matters of public interest — including those not readily recognized as "hard news" — are newsworthy (see, e.g., *Stephano v News Group, supra*, 64 N.Y.2d at 179-186 [picture of plaintiff wearing leather bomber jacket in column about "new and unusual products and services"]; *Abdelrazig v Essence Communications*, 225 A.D.2d 498, 639 N.Y.S.2d 811 [picture of plaintiff in "African garb" concerned "newsworthy fashion trends in the Black community"], lv denied 88 N.Y.2d 810; *Creel v Crown Publishers*, 115 A.D.2d 414, 496 N.Y.S.2d 219 [picture of plaintiffs illustrating guide to nude beaches]; *Lopez v Triangle Communications*, 70 A.D.2d 359, 360, 421 N.Y.S.2d 57 ["make-over" pictures in Seventeen magazine]; *Rand v Hearst Corp.*, 31 A.D.2d 406, 407-411, 298 N.Y.S.2d 405 [quotation on book cover comparing author to plaintiff], aff'd 26 N.Y.2d 806, 309 N.Y.S.2d 348, 257 N.E.2d 895; *Stern v Delphi Internet Services Corp.*, 165 Misc. 2d 21, 22-27, 626 N.Y.S.2d 694 [lewd photograph of plaintiff used in connection with promotion for internet news service]; *Welch v Group W. Productions*, 138 Misc. 2d 856, 525 N.Y.S.2d 466 [use of television commercial in connection with Clio awards]; *Namath v Sports Illustrated*, 80 Misc. 2d 531, 533-535, 363 N.Y.S.2d 276 [photographs of plaintiff in promotional material], aff'd 48 A.D.2d 487, 371 N.Y.S.2d 10, and affd 39 N.Y.2d 897, 386 N.Y.S.2d 397, 352 N.E.2d 584; *Ann-Margret v High Society Magazine*, 498 F. Supp. 401, 405 [partially nude photograph of plaintiff]).

Appendix A

Consistent with the statutory — and constitutional — value of uninhibited discussion of newsworthy topics, we have time and again held that, where a plaintiff's picture is used to illustrate an article on a matter of public interest, there can be no liability under sections 50 and 51 unless the picture has no real relationship to the article or the article is an advertisement in disguise (see, *Howell v New York Post, supra,* 81 N.Y.2d at 123; *Finger v Omni Publications, supra,* 77 N.Y.2d at 143; *Arrington v New York Times Co.,* 55 N.Y.2d 433, 440, 449 N.Y.S.2d 941, 434 N.E.2d 1319, cert. denied 459 U.S. 1146, 74 L. Ed. 2d 994, 103 S. Ct. 787; *Murray v New York Magazine Co.,* 27 N.Y.2d 406, 409, 318 N.Y.S.2d 474, 267 N.E.2d 256). That has been so even where a plaintiff's photograph, when juxtaposed with an article, could reasonably have been viewed as falsifying or fictionalizing plaintiff's relation to the article.

In the recent case of Finger, for example, defendant used a photograph of plaintiffs Joseph and Ida Finger and their six children to illustrate an article on caffeine-aided in vitro fertilization. Plaintiffs sought damages for defendant's use of their photograph, arguing that none of their children were conceived through in vitro fertilization, and that they did not participate in the caffeine-aided fertility project. While this Court was made well aware of the false impression potentially created by defendant's use of the photograph, we nevertheless upheld dismissal of plaintiffs' Civil Rights Law claim, repeating once again that the article was newsworthy, that there was a real relationship between the photograph and the article, and that the article was not an advertisement in disguise (see, 77 N.Y.2d at 142-145).

Similarly, in Arrington, the New York Times Sunday Magazine used the plaintiff's photograph without his consent "as the most prominent illustration of a feature article entitled 'The Black Middle Class: Making It' " (55 N.Y.2d at 437). Plaintiff alleged that the article expressed views with which he did not agree and that illustrating the article with his photograph was " 'distorting' * * * not only of black persons of 'middle class' status generally but also of himself, as its supposed exemplar, in particular" (id. [emphasis added]). He complained that "others quite reasonably took the article's ideas to be ones he shared" (*id., at 438).* And, in his brief to this Court, Arrington argued, citing *Binns v Vitagraph Co. of America* (210 N.Y. 51, 103 N.E. 1108), that "to the extent that publication of [his] photograph * * * conveys the impression that he shares the views stated in the * * * article, it is pure fiction" that is "prohibited by the statute" (Plaintiff's Brief, at 19). Still, we rejected plaintiff's allegation that he was entitled to recover under the Civil Rights Law, concluding that the newsworthiness exception applied as a matter of law. We declared that plaintiff's contention that the article portrayed him in a "false light" was not cognizable, and that it would be "unwise" for the courts "to essay the dangerous task of passing on value judgments based on the subjective happenstance of whether there is an agreement with views expressed on a social issue" (55 N.Y.2d at 441-442).

Again in Murray, plaintiff's photograph, taken while attending a St. Patrick's Day Parade in green regalia, appeared on the cover of the defendant's magazine. "Directly above that photograph" was the caption, "The Last of the Irish Immigrants" (*Murray v New York Magazine Co., supra,*

27 N.Y.2d at 408). The article discussed "contemporary attitudes of Irish-Americans in New York City" (*id.*, at 409). Although the Murray plaintiff was "not of Irish extraction" (*id.*, at 408), we ruled that defendant was entitled to summary judgment, because the article was newsworthy and not advertising in disguise, and because a genuine relationship existed between the photograph and the article (*id.*, at 408-410).

Thus, it is clear that a Civil Rights Law §§ *50* and 51 claim does not lie where a plaintiff's photograph is used to illustrate a newsworthy article. There are two limitations: first, there must be a real relationship between the article and the photograph (see, e.g., *Thompson v Close-Up*, 277 A.D. 848, 98 N.Y.S.2d 300 ["no connection" between photograph and article on dope peddling]), and second, the article cannot be an advertisement in disguise (see, *e.g.*, *Beverley v Choices*, *supra*, 78 N.Y.2d at 752-753 [calendar was advertisement in disguise]). Of course, a Civil Rights Law claim may lie if a plaintiff's picture is used purely for trade purposes, and not in connection with a newsworthy article (see, *Brinkley v Casablancas*, 80 A.D.2d 428, 438 N.Y.S.2d 1004 [Civil Rights Law action lies for defendants' distribution of pin-up posters without plaintiff's consent]).

Applying these settled principles, we answer the first certified question in the negative. Plaintiff concedes that the "Love Crisis" column was newsworthy, since it is informative and educational regarding teenage sex, alcohol abuse and pregnancy — plainly matters of public concern. Further, she concedes that the photographs bore a real relationship to the article, and there is no allegation that the

article was an advertisement in disguise. Given these facts, Finger, Arrington and Murray dictate that plaintiff may not recover under the Civil Rights Law, regardless of any false implication that might be reasonably drawn from the use of her photographs to illustrate the article.[2]

Notwithstanding these precedents, plaintiff contends that an action lies under the Civil Rights Law where a photograph, juxtaposed with an article, creates a "substantially fictionalized" implication. In support of this assertion, plaintiff cites two cases: *Spahn v Julian Messner, Inc.* (18 N.Y.2d 324, 274 N.Y.S.2d 877, 221 N.E.2d 543, vacated 387 U.S. 239, adhered to on remand 21 N.Y.2d 124 [1967]), and *Binns v Vitagraph Co. of America* (210 N.Y. 51, 103 N.E. 1108 [1913]).

In *Spahn*, defendants published a book entitled The Warren Spahn Story about the life of plaintiff, a famous baseball player. The book, however, was largely fiction. As was found by the trial court, the book was replete with imaginary incidents, invented dialogue, dramatized portrayals and manipulated chronologies. There was no effort and no intention to follow the facts of plaintiff's life.

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2. We have not been asked to, and do not, pass on the question whether a reasonable reader could conclude that plaintiff was the person identified as "Mortified," given that the pictures were obviously contrived and she was not identified as the author of the letter (see, *University of Notre Dame Du Lac v Twentieth Century-Fox Film Corp.*, 22 A.D.2d 452, 455, 256 N.Y.S.2d 301 [reasonable viewers would know that "they are not seeing or reading about real Notre Dame happenings or actual Notre Dame characters"], *aff'd* 15 N.Y.2d 940, 259 N.Y.S.2d 832, 207 N.E.2d 508).

Defendants conducted little research, and never interviewed plaintiff, his family or any baseball player who knew him. This Court upheld a jury verdict granting plaintiff an injunction and damages pursuant to Civil Rights Law § 51, stating that although an unauthorized, truthful biography of plaintiff would be newsworthy, the protection of the newsworthiness doctrine did not extend to this "substantially fictitious biography" (18 N.Y.2d at 328-329). On remand from the United States Supreme Court to consider the First Amendment implications of the verdict, this Court adhered to its decision, stating that it was "unnecessary" to protect the "knowing fictionalization presented here" (21 N.Y.2d at 129).

Similarly, in Binns, defendant produced a film about plaintiff's role in rescuing the passengers of a shipwrecked boat. Although based on a true occurrence, the details were manufactured, and the story was "mainly a product of the imagination." This Court held that defendant's conduct was actionable under section 51, stating that although a truthful "recounting or portraying [of] an actual event" would be protected, the film was designed to amuse the audience rather than to "instruct or educate" (see, *Binns v Vitagraph Co., supra,* 210 N.Y. at 56-59).

The District Court and the Second Circuit perceived a tension between the *Finger-Arrington-Murray* line and the older *Binns-Spahn* cases, in that the older cases held that the substantially fictionalized use of a plaintiff's name or likeness may be actionable, while the newer cases — without citing *Binns or Spahn* — focus on the existence of a "real relationship" and whether the work is an advertisement in

disguise. Thus, the Second Circuit certified the present questions to us.

We see no inherent tension between the *Finger-Arrington-Murray* line and the *Binns-Spahn* line. *Finger, Arrington and Murray*, which are directly on point, state the rule applicable here. All three cases involved the unauthorized, and allegedly false and damaging, use of plaintiffs' photographs to illustrate newsworthy articles. Because the photographs illustrated newsworthy articles, because there was a real relationship between the photographs and the articles, and because the articles were not advertisements in disguise, we concluded that none of those plaintiffs stated a Civil Rights Law claim. Nor does plaintiff here.

By contrast, *Binns and Spahn* concerned a strikingly different scenario from the one before us. In those cases, defendants invented biographies of plaintiffs' lives. The courts concluded that the substantially fictional works at issue were nothing more than attempts to trade on the persona of Warren Spahn or John Binns. Thus, under *Binns* and *Spahn*, an article may be so infected with fiction, dramatization or embellishment that it cannot be said to fulfill the purpose of the newsworthiness exception. Here, by contrast, the "Love Crisis" column was concededly newsworthy. Thus, this case is controlled by *Finger* — not by *Binns* or *Spahn*.

The dissent argues that *Binns* and *Spahn* permit a plaintiff to recover if the plaintiff's name or likeness is used in a substantially fictionalized way — including where, as

here, the use of a plaintiff's picture in juxtaposition to a newsworthy article creates a false implication (see, Dissent, at 2-8). This, however, conflicts with our holdings in *Finger*, *Arrington* and *Murray* that the use of a photograph to illustrate a newsworthy article does not state a claim under the Civil Rights Law — regardless of any false impression created by the use of the photograph — so long as the article is not an advertisement and there is a real relationship between the photograph and the article.[3] For that same reason, the dissent is wrong to assert that our discussion in *Gautier v Pro-Football, Inc. (supra,* 304 N.Y. 354, 359-360, 107 N.E.2d 485), which mirrors the analysis in *Binns* and *Spahn*, controls the result here (see, Dissent, at 4-7). Simply, neither *Binns*, *Spahn* nor *Gautier* concerns the use of a photograph to illustrate a newsworthy article.[4]

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3. As is evident from its opening, the dissent misinterprets our decision. We do not hold that the newsworthiness exception forecloses liability under the Civil Rights Law whenever "the words of the column project an abstractly newsworthy subject matter" (see, Dissent, at 1). Rather, we hold only that there is no Civil Rights Law action for a photograph illustrating a newsworthy article if there is a real relationship between the photograph and the article, and the article is not an advertisement in disguise. Our holding follows settled law and neither marginalizes nor immobilizes the statutory remedy.

4. Because Gautier remains good law, there is no significance to the Murray Court's use of an ellipsis to pass over a citation to Gautier in a quote from *Dallesandro v Holt & Co.* (4 A.D.2d 470, 471, 166 N.Y.S.2d 805, appeal dismissed 7 N.Y.2d 735, 193 N.Y.S.2d 635, 162 N.E.2d 726*)* (see, Dissent, at 9-10). Indeed, Dallesandro cited Gautier for an uncontested general principle, and the Murray Court's use of the ellipsis did not alter the meaning of the Dallesandro passage.

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Further, contrary to the dissent, it cannot be fairly argued that fictionalization was not at issue in *Finger*, *Arrington* and *Murray* (see, Dissent, at 8-13). Rather, as noted, the nub of plaintiffs' complaints in all three cases was that the use of their pictures in the articles created a false impression about them in the minds of readers. The fictionalization issue was squarely addressed in the *Finger* briefs (see, Plaintiff's Brief, at 5, 10-13; Defendant's Brief, at 3, 28-33), as well as in the *Arrington* briefs (see, Plaintiff's Brief, at 19). Indeed, in his brief to this Court, *Arrington* cited *Binns* for the proposition that "fiction" was actionable under sections 50 and 51 (see, id.). In response, defendant argued that, under *Murray*, *Arrington* could not recover because the picture bore a real relationship to the newsworthy article (see, Defendant's Brief, at 11-25). We rejected the very same claim in *Arrington* that plaintiff raises here: that the Civil Rights Law allows recovery where the juxtaposition of a photograph to the text is distorting in its implication that plaintiff is the subject of the article. Thus, it is clear from *Finger*, *Arrington* and *Murray* that when a plaintiff's likeness is used to illustrate a newsworthy article, the plaintiff may not recover under sections 50 and 51 even if the use of the likeness creates a false impression about the plaintiff. This holding applies equally in the case at hand.

Also contrary to the dissent, our result would be the same whether plaintiff were Jamie Messenger or a famous person, like Shirley Temple (see, Dissent, at 8). The test is not whether plaintiff is a public or private figure. Rather, the analysis centers on whether the photograph bears a real relationship to a newsworthy article and is not an advertisement in disguise. Where those requirements are met, there is no cause of action under the Civil Rights Law.

Notably, if the newsworthiness exception is forfeited solely because the juxtaposition of a plaintiff's photograph to a newsworthy article creates a false impression about the plaintiff, liability under Civil Rights Law § 51 becomes indistinguishable from the common law tort of false light invasion of privacy. One form in which the false light invasion of privacy tort "frequently appears is the use of the plaintiff's picture to illustrate a book or an article with which he has no reasonable connection, with the implication that such a connection exists" (Prosser and Keeton, The Law of Torts § 117, at 864 [5th ed] [emphasis added]). New York does not recognize such a common law tort (see, *Howell v New York Post Co., supra,* 81 N.Y.2d at 123-124).

Accordingly, the first certified question should be answered in the negative, and we need not address the second.

Following certification of questions by the United States Court of Appeals for the Second Circuit and acceptance of the questions by this Court pursuant to § 500.17 of the Rules of Practice of the New York State Court of Appeals, and after hearing argument by counsel for the parties and consideration of the briefs and the record submitted, certified question No. 1 answered in the negative and certified question No. 2 not answered. Opinion Per Curiam.

DISSENT: Bellacosa, J. (dissenting):

I respectfully disagree and would answer the first question in the affirmative. Under the analysis of the Per Curiam Opinion, no matter what the published photographs of plaintiff depict or connote, if the words of the column project an abstractly newsworthy subject matter, then the judicially created newsworthiness exemption forecloses the remedy of Civil Rights Law §§ 50 and 51. This latest extension marginalizes the statutory authorization that was enacted expressly to supply potential redress for aggrandizing uses of a person's "portrait or picture."

We all agree that the courts have properly created a newsworthiness exception to liability pursuant to the Civil Rights statute. The courts have, however, also harnessed a runaway newsworthiness exemption with exceptions. Part of the puzzle here is whether there are two exceptions — advertisement in disguise and no "real relationship" — or three — also a distinctive "material and substantial falsification" prong.

A recent decision of this Court fosters the vexing implication that only two exceptions to the newsworthiness exemption exist because the case happens to mention only two (*Finger v Omni Publs. Intl.*, 77 N.Y.2d 138, 564 N.Y.S.2d 1014, 566 N.E.2d 141). That, in part, may explain the Second Circuit Court's quandary as to whether the "substantial falsification" facet is still viable to mitigate a functionally sweeping newsworthiness immunization against the invocation of the statute.

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If the "fictionalization exception" remains part of New York law, as I contend, then despite the newsworthiness of part of the published column — which might otherwise operate to block this plaintiff's invocation of the remedial statute against defendants — Messenger's victory before a Federal jury could be sustainable. If, on the other hand, the "fictionalization exception" is rendered a "dead letter" — and newsworthiness reigns — then Messenger's Federal lawsuit is equally comatose.

I.

Civil Rights Law § 50 provides that anyone using a picture of a living person for the purposes of trade, without having first obtained the written consent of such person, or a parent or guardian, commits a misdemeanor. Civil Rights Law § 51 adds the civil damages teeth. These complementary provisions were enacted in response to early judicial reluctance against recognizing a common law right of privacy, coupled with a judicially expressed encouragement for a legislative solution (see, *Roberson v Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 [1902]).

The Legislature acted in 1903. It also left the courts with a hefty burden of substantive interpretation that continued through the whole 20th Century, and now into Year 2000.[1]

1. A prescient Law Review note in 1990 suggested "that New York's continued refusal to recognize a common-law right to privacy is becoming increasingly troublesome as the twenty-first century draws near and the threat to individual privacy mounts with the emergence of new technologies capable of ever more intrusive (Cont'd)

Shortly after the statutory framework came into being, this Court examined the fictionalization of a plaintiff's exploits and found defendants liable under the statute (*Binns v Vitagraph Co. of Am.*, 210 N.Y. 51, 103 N.E. 1108 [1913]). The Court also warned of the difficulties of "the practical enforcement of any rule which may be adopted in construing and enforcing the statute so far as it relates to purposes of trade;" it encouraged further legislative action to clarify the key phrase (*Binns v Vitagraph Co. Am., supra,* at 58-59). No new enactment ensued, and the courts have continued the struggle to apply the definition of "purposes of trade."

A comprehensive exegesis emerged in 1937 in *Lahiri v Daily Mirror, Inc.* (162 Misc. 776, 295 N.Y.S. 382 [Sup Ct, NY County; Sheintag, J.]). An important feature of the opinion includes an observation that "the emphasis [in cases where liability pursuant to the statute was found] was placed on dramatization rather than information" (*Lahiri v Daily Mirror, Inc., supra,* at 781 [emphasis added]).

Courts continued to use the "dramatization" feature to distinguish between the statute's availability or inertness.

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applications. In addition, this Note will assert that this refusal to recognize a right to privacy is rendered all the more distressing by the fact that, despite the extraordinary number of privacy-related cases that have filtered through the New York courts, there is an undeniable paucity of decisions in which the courts have satisfactorily explained the reasoning behind this continued refusal to embrace a right so fundamental to American society" (Note, The Right to Privacy One Hundred Years Later: New York Stands Firm as the World and Law Around it Change, 64 St. John's L Rev 315, 323).

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When "the total dominant impression conveyed is basically not a true picture or representation of the actual salient facts," and when the "article read as a whole, together with the headings and the pictorial representations that accompany it, constitute a sensationalized version of facts embellished with matters drawn from the author's imagination," the material may go "far beyond the scope of proper immunity pertaining to the publication of current or past news"; there, the complaint should not be stricken (*Sutton v Hearst Corp.*, 277 A.D. 155, 156-157, 98 N.Y.S.2d 233 [1st Dept 1950], appeal denied 277 A.D. 873, citing *Binns v Vitagraph Co. of Am., supra* [emphasis added]). Also, when the photograph of a plaintiff was juxtaposed next to an article about a subject (*e.g.*, dope peddling) with which the plaintiff had no connection, the use has been deemed for purposes of trade (*Thompson v Close-Up, Inc.*, 277 A.D. 848, 98 N.Y.S.2d 300 [1st Dept 1950]).

Shortly after these Appellate Division decisions, this Court ruled on a statutory privacy claim stemming from the televised projection of a plaintiff who had performed during the half-time show of a professional football game. After the Court found that the telecast of the plaintiff's act had not been used for advertising purposes, this Court plumbed the definition of "use for purposes of trade" with respect to television, which, "like other media * * * may have either a trade aspect or an informative or news aspect" (*Gautier v Pro-Football,* 304 N.Y. 354, 359, 107 N.E.2d 485 [1952]). The Court noted that use of a name or picture "in connection with an item of news or one that is newsworthy, is not a use for purposes of trade within the meaning of [the statute]" (*Gautier v Pro-Football, supra*, at 359). It cautioned,

however, that there must be a "legitimate" connection between the item of news and the use of a name or picture in order to remove the use from the realm of "trade" (*Gautier v Pro-Football*, 304 N.Y. 354, 359, 107 N.E.2d 485 [1952] citing, *inter alia*, *Lahiri v Daily Mirror, supra).*

The Court also discretely emphasized that simply because a public figure or a presently newsworthy person is the proper subject of news or informative presentation, the newsworthy "privilege does not extend to commercialization of his personality through a form of treatment distinct from the dissemination of news or information" (*id.*, at 359, citing, *inter alia*, *Binns v Vitagraph Co. of Am., supra; Sutton v Hearst Corp., supra).* Alluding particularly to Sutton, the Court underscored the fact that the question was whether the story "as presented to the reader" was "so embellished in the telling that it was no longer a factual report" (*Gautier v Pro-Football, supra, at 360).* If the story was so dramatized, its newsworthiness immunity from the operation of the statute is forfeited and lost (see, *id.*).

The precedential value of *Gautier*, amidst the nuanced history of this statute in relation to the interpretive precedents, is — or should still be — a matter of greater qualitative, yet not controlling, value than the Majority allows.

II.

This Court enunciated a fictionalization exception to newsworthiness immunity, consistent with the seminal *Gautier* analysis, when it found that a substantially

fictionalized biography constituted an unauthorized exploitation of the plaintiff's personality "for purposes of trade" (see, *Spahn v Julian Messner, Inc.*, 18 N.Y.2d 324, 274 N.Y.S.2d 877, 221 N.E.2d 543 [1966], rearg 21 N.Y.2d 124). The Court recognized that even a public figure's "personality" may be "fictionalized," and as such, the baseball star's story was found to have exploited his persona for commercial value (see, *id.*, at 328).

On reargument of *Spahn* in light of the United States Supreme Court's *Time, Inc. v Hill* (385 U.S. 374, 17 L. Ed. 2d 456, 87 S. Ct. 534) decision, this Court stood by its initial decision with respect to the fictionalized account of the professional athlete's life. The Court, of course, also necessarily imbued the authoritative interpretation of New York substantive law with the requisite constitutional speech protections:

> "Before recovery by a public figure may be had for an unauthorized presentation of his life, it must be shown, in addition to the other requirements of the statute, that the presentation is infected with material and substantial falsification and that the work was published with knowledge of such falsification or with a reckless disregard for the truth" (*Spahn v Julian Messner, Inc.*, 21 N.Y.2d 124, 127, 286 N.Y.S.2d 832, 233 N.E.2d 840 [1967] [emphasis added]).

The Court found that the use of "invented dialogue" to supply "a dramatic portrayal attractive to the juvenile reader" in a manner "customary" for the type of book involved did

not entitle the defendants to publish such "knowing fictionalization", which was "destructive of an individual's right * * * to be free of the commercial exploitation of his name and personality" (*Spahn v Julian Messner, Inc.*, 21 N.Y.2d 124, 286 N.Y.S.2d 832, 233 N.E.2d 840, *supra*, at 127-129). Thus, if there was any doubt after *Gautier* that the courts should make a fictionalization/falsification examination in a "purposes of trade" inquiry, *Spahn II* provided enduring insights. The quoted language offers significant relevance, not the ephemeral distinguishments proffered by the Majority.

The protection for exploited persons against falsification or fictionalization for public figures was also extended to private individuals in *Pagan v New York Herald Tribune* (32 A.D.2d 341, 301 N.Y.S.2d 120 [1st Dept 1969], aff'd without op'n 26 N.Y.2d 941 [1970]). The Appellate Division opinion summarized pertinent law regarding when the use of a name or picture falls outside the statute's meaning of "purposes of trade":

> "Where a picture of an individual is published in a newspaper or magazine in connection with the presentation, without false or misleading material, of a matter of legitimate public interest to readers, and the picture bears a reasonable relationship to the presentation, the use of the picture in the publication is not actionable as a use for the purpose of advertising or trade within the prohibition of the statute unless the presentation is in effect an advertisement in disguise" (*Pagan v New York Herald Tribune, supra,* at 343 [emphasis added]).

Appendix A

If a Shirley Temple-like set of photos were used with this identical column, that would more than likely be actionable, as trading on the persona of a famous individual. The 14-year-old plaintiff adolescent, a private person who cannot even legally give consent to the use of her photos, should have no less a remedy for someone trading on her persona and aspirations, the particular protection tendered by the statute. This contrast dramatizes the irony of a real tension, as I see it, between the extant precedential lines and a growing atrophy of the Civil Rights statute.

III.

This Court more recently has had an opportunity to examine the Civil Rights Law in the context of a series of cases that analyzed essentially only the "no real relationship" exception. A magazine cover depicted a plaintiff, not of Irish extraction, in a St. Patrick's Day Parade, with the title of the feature article, "The Last of the Irish Immigrants" (*Murray v New York Mag. Co.*, 27 N.Y.2d 406, 318 N.Y.S.2d 474, 267 N.E.2d 256 [1971]). The opinion addressed only the question " 'whether the plaintiff's photograph has some relevance to the article' " (*id.*, at 408), but part of Murray has become the resounding sound bite for Civil Rights Law §§ 50 and 51 jurisprudence as follows:

> "A picture illustrating an article on a matter of public interest is not considered used for the purpose of trade or advertising within the prohibition of the statute * * * unless it has no real relationship to the article * * * or unless the article is an advertisement in disguise.

> (*Dallesandro v Holt & Co., 4 A.D.2d 470, 471, 166 N.Y.S.2d 805, app dsmd* 7 N.Y.2d 735*; see also, Pagan v New York Herald Tribune*, 32 A.D.2d 341, 301 N.Y.S.2d 120, affd 26 N.Y. 941 * * *)" (*Murray v New York Mag. Co., supra,* at 409).

However, as sound bites are often misleading due to their lack of context, so too is Murray's extrapolation from Dallesandro. A careful tracing of the Dallesandro material that has popped out as "the quotable quote" from Murray reveals that Dallesandro faithfully cited to and relied on the seminal whole-cloth of Gautier:

> "A picture illustrating an article on a matter of public interest is not considered used for the purpose of trade or advertising within the prohibition of the statute (*Gautier v Pro-Football*, 304 N.Y. 354, 359, 107 N.E.2d 485) unless it has no real relationship to the article (*Thompson v Close-Up*, 277 A.D. 848, 98 N.Y.S.2d 300), or unless the article is an advertisement in disguise (*Griffin v Medical Soc. of State of NY*, 7 Misc. 2d 549, 11 N.Y.S.2d 109)" (*Dallesandro v Henry Holt & Co.*, 4 A.D.2d 470, 471, 166 N.Y.S.2d 805).

All the pieces are pivotal, in my view, for a plenary appreciation of the jurisprudence affecting the instant controversy — not just the latest cases, as the Majority posits. As I have pointed out, *Gautier* emphasized separately the importance of dramatization or fictionalization when

analyzing whether a use was "for purposes of trade," an inquiry distinct from, yet not divorced from, the real relationship issue. This citation to *Gautier* was not crucial in *Murray*, where the only question was whether the photograph was reasonably connected to the article (see, *Murray v New York Magazine Co.*, 27 N.Y.2d 406, 318 N.Y.S.2d 474, 267 N.E.2d 256, *affirming Murray v New York Magazine Co.*, 35 A.D.2d 557, 314 N.Y.S.2d 324). But the faithful link to *Gautier* in *Dallesandro* has simply gotten lost along the way.

Additionally, *Murray* also extracts from *Pagan* a quotation pertinent to the *Murray* issue, to wit, "that picture was published * * * 'in connection with the presentation * * * of a matter of legitimate public interest to readers' " (27 N.Y.2d at 409). Again, this excerpt summarized the state of New York law as far as was concerned in *Murray*, replacing with ellipses the material that, because of the limited nature of the inquiry in *Murray*, was not necessarily apt — unlike in the instant case. Indeed, the omitted language is key here — the presentation must be made "without false or misleading material" (*Pagan v New York Herald Tribune*, 32 A.D.2d 341, 301 N.Y.S.2d 120, aff'd without op'n 26 N.Y.2d 941).

The abbreviated use of excerpts from the line of precedents is understandable in Murray and more recent cases involving "real relationship" core problems (*see, Arrington v New York Times Co.*, 55 N.Y.2d 433, 449 N.Y.S.2d 941, 434 N.E.2d 1319 [1982]; *see also, Stephano v News Group Pub., Inc.*, 64 N.Y.2d 174, 184-185, 485 N.Y.S.2d 220, 474 N.E.2d 580 [1984]). The truncated use, however, must be

recognized and reconciled to provide a thorough understanding of the applicable principles.

The most recent and next significant Court of Appeals development analyzing the "no real relationship" issue is the case that seems to have sealed the Second Circuit Court of Appeals' need to certify to this Court its uncertainties about the state of New York law (*Finger v Omni Publs. Intl.*, 77 N.Y.2d 138, 564 N.Y.S.2d 1014, 566 N.E.2d 141 [1990]). In the briefs to this Court, the Finger plaintiffs urged one question only — "whether a real relationship existed between the photograph * * * and an article dealing specifically with caffeine enhanced in vitro fertilization." The plaintiffs only tangentially touched on the falsification question, while they relied primarily on *Arrington* and *Murray*. They urged that the story "is of such a tenuous nature that it creates the false and misleading perception that [the] family was conceived using in vitro fertilization or caffeine enhancement techniques." Indeed, this Court considered the plaintiffs' argument as one of purely " 'no real relationship' " (*Finger v Omni Publs. Intl., supra,* at 142; *compare, Davis v High Society Mag., Inc.*, 90 A.D.2d 374, 457 N.Y.S.2d 308; *Lerman v Flynt Distributing Co., Inc.*, 745 F.2d 123 [examining precedent of this Court that supports the substantial fictionalization premise and exception]). Since the *Finger* plaintiffs hinged the false perception argument on the premise that there was no real relationship, once the Court determined that a real relationship existed, the Court ended the analysis. It did not have to take the further step implicated point-blank in this case — to address the falsification issue. Because the Majority essentially subsumes this step, I disagree with its analysis leading to the negative answer to the first certified question.

Appendix A

The fact that *Finger* did not purport to address the falsification issue could support the argument that this third exception did not survive *Finger*. The answer, however, to the Second Circuit's question of whether *Finger* mutes the *Spahn* falsification exception may more reliably be found, I respectfully submit, by nimble, precise tracings to the authority sources found within *Finger* itself. *Finger* continues the scrunched *Murray-Dallesandro* snippet that replaced with ellipses *Dallesandro's* reference to *Gautier* (*Finger v Omni Publs. Intl., supra,* at 142). Intriguingly, however, *Finger* also cites to page 185 of the *Stephano* opinion. This important reference contains (1) the citation to the page in *Gautier*, which, citing to *Sutton*, issued the admonition against dramatization or fictionalization, and (2) the citation to *Pagan*, which extended the fictionalization concern to private persons. The failure to discuss *Spahn*, the most obvious fictionalization precedent, in *Finger* is thus explained away for me, though my overall view is summed up by the Majority as a misinterpretation. *Spahn*, unlike *Finger*, involved a public figure. The reference, instead, to a case that relied on *Pagan* is far more revealing. *Pagan* essentially tells us that if a purveyor is going to present the photograph of an individual, even in conjunction with a newsworthy item, the presentation must be legitimately made "without false or misleading material" (*Pagan v New York Herald Tribune, supra,* at 341). That is still good law and supports the affirmative answer I would give to the question posed in relation to this controversy.

In any event, the substantive law question of this case was simply not the dispositive or necessarily implicated thrust in *Finger*. Thus, the instant case is also demonstrably

distinguishable from *Finger* on its facts and import. In *Finger*, "neither the article nor the caption mentioned plaintiffs' names or indicated in any fashion that the adult plaintiffs used caffeine or that the children were produced through in vitro fertilization" (*Finger v Omni Publs. Intl., supra,* at 140 [emphasis added]).

Here, the caption juxtaposed next to and across a large picture of Jamie Messenger, looking "hung over," states, "I got trashed and had sex with three guys * * * Even worse, I heard them laughing about it the next day" (emphasis added). The smaller caption within the photograph with Messenger reads, "You made a pretty big mistake" (emphasis added). Another caption within another picture of Messenger looking distraught reads, "Afraid you're pregnant?" (emphasis added). These captions, "pull quotes" and photographs leap off the page with the real relationship to the published material — which is not contested — but also with the substantial falsification of the photographs in the kind, manner and degree to which they were exploited. In *Finger*, there was no indication in any fashion that the plaintiffs in the associated picture had experienced what was described in the content of the article. In this case, that very linkage is soldered together and dramatized. In my opinion, that is what takes this case over tolerable lines and limits.

Here, a Federal Court jury found that reasonable readers would think Messenger was unquestionably the subject and signatory of an ersatz letter. Despite the abstracted public-interest newsworthy quality of the editor's answer to the letter, the falsified connection — "I got wasted . . ." — personalizes the matter in a devastating fashion. Even though

the column enjoys the academic quality of a newsworthy subject matter, its presentation publicly paraded plaintiff as the epitomized subject for sensationalized impact.[2] That should not be immune from the statute's reach.

I am unable to discern support in this Court's developed line of analysis — until today — for the conclusion that this substantially fictionalized portrayal of Messenger's likeness is beyond the statute's ken just because something about it is newsworthy in a general way. That, as I understand it — or misinterpret it, as the Majority characterizes my view — is the bottom line of the Majority's negative answer transmitted to the Second Circuit. For me, New York law supports a more nuanced and generous approach to the applicability of this now largely immobilized statute that is functionally and realistically foreclosed by today's ruling (*see, Binns v Vitagraph Co. of Am., supra; Gautier v Pro-Football, supra citing Sutton v Hearst Corp., supra; Spahn I, supra*, and *Spahn II, supra*; *Pagan v New York Herald Tribune, supra; Stephano v News Group Pub, supra; see also, Lerman v Flynt Distributing Co., Inc., supra; Davis v High Society Magazine, Inc., supra).*

In sum, the practical and theoretical consequence of the negative answer justifies a too-facile escape valve from the operation of the statute, one that is also unilaterally within

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2. The resolution of the Federal appeal and the answer to the certified questions are complicated further by the District Court ruling which precluded the plaintiff's proof and evidence with respect to a bifurcated fictionalization in relation to the published verbiage, as distinguished from the photographs themselves in their juxtaposition to the texts.

the control of the alleged wrongdoer. The paradigm for editors is a "newsworthy" homily to lovesick adolescents or any other audience; they then just have to use a journalistic conceit of tieing the advice to a purported letter to the editor, with an inescapable first person identification of the letter as originating with any adolescent in the photo array. When an aggrieved person like Messenger reaches for the statutory lifeline, the newsworthiness notion dissipates it into a dry mirage. That is not fair or right.

Strong New York jurisprudence and protection of constitutional speech guarantees — that I too support — are urged as overarching policy reasons for courts to be very circumspect with respect to claims under the Civil Rights statutes. That should not be a pre-emptive justification for courts to neutralize, in functional applications, a remedial statute that this Court nudged into existence. In the endeavor to live up to this Court's and New York's robust tradition of free speech and free press protections, statutory rights and reputations of individuals can also be proportionately safeguarded and legitimately redressed.

APPENDIX B — PER CURIAM OPINION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK DATED AND DECIDED JUNE 8, 1999

COURT OF APPEALS
OF THE STATE OF NEW YORK

No. 170

JAMIE MESSENGER, an infant under the age of eighteen, by her mother and "next friend" Donna Messenger,

Plaintiff-Appellee-Cross-Appellant,

v.

GRUNER + JAHR PRINTING AND PUBLISHING, also known as Gruner + Jahr USA,

Defendant-Appellant-Cross-Appellee,

and

SALLY LEE, as editor-in-chief of "YM, Young & Modern,"

Defendant.

Decided: June 8, 1999

Before: KAYE, BELLACOSA, SMITH, LEVINE, CIPARICK, WESLEY and ROSENBLATT, Judges

Appendix B

OPINION

PER CURIAM:

Certification of questions by the United States Court of Appeals for the Second Circuit, pursuant to section 500.17 of the Rules of the Court of Appeals (22 NYCRR 500.17), accepted and the issues presented are to be considered after briefing and argument.

APPENDIX C — PER CURIAM OPINION AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND DECIDED APRIL 28, 1999

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 98-7767(L), 98-7865(XAP)

JAMIE MESSENGER, an infant under the age of eighteen, by her mother and "next friend" Donna Messenger,

Plaintiff-Appellee-Cross-Appellant,

v.

GRUNER + JAHR PRINTING AND PUBLISHING, also known as Gruner + Jahr USA,

Defendant-Appellant-Cross-Appellee,

and

SALLY LEE, as editor-in-chief of "YM, Young & Modern,"

Defendant.

Appeals from the United States District Court for the Southern District of New York

Decided: April 28, 1999

Appendix C

Before: MCLAUGHLIN, STRAUB, and KEITH, Circuit Judges.*

OPINION

PER CURIAM:

Certificate to the New York Court of Appeals pursuant to Local Rule § 0.27 and New York Compilation of Codes, Rules & Regulations, title 22, § 500.17(b).

Gruner + Jahr Printing and Publishing appeals from a judgment after a jury trial in the United States District Court for the Southern District of New York (Lewis A. Kaplan, Judge) awarding damages to Jamie Messenger pursuant to New York Civil Rights Law §§ 50 and 51. Gruner + Jahr raises several issues in its appeal, and Messenger cross-appeals arguing that the District Court improperly limited her recovery. The only issue that we need reach at this stage, however, concerns the proper interpretation of §§ 50 and 51, New York's statutory right to privacy. Because that issue is important, unsettled, and dispositive of this litigation, we respectfully certify the questions formulated below to the New York Court of Appeals and retain jurisdiction so that we might dispose of the appeal after we receive the Court of Appeals' response.

BACKGROUND

Gruner + Jahr publishes a magazine called YM, Young and Modern, which includes articles and features on beauty,

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* The Honorable Damon J. Keith, of the United States Court of Appeals for the Sixth Circuit, sitting by designation.

fashion, and relationships, aimed at a target audience of teenage girls. In 1994 and 1995, a regular column entitled "Love Crisis" ran in YM; each column featured a letter addressed to YM's editor-in-chief, asking for advice about a "love problem." The column also contained the editor-in-chief's responses to the letters and a series of captioned photographs of a model illustrating the issues raised in the letter. The column never included the real names of the letters' authors; rather, the letters were signed with melodramatic adjectives and phrases.

Sometime in 1994 or 1995, Jamie Messenger posed for photographs to be published in YM. The parties appear to agree that, although Messenger had been booked through a modeling agency, YM did not receive adequate consent for its use of the photographs because Messenger was only fourteen-years-old at the time and because YM did not obtain consent from Messenger's parents. YM later used these photographs to illustrate the Love Crisis column in its June/July 1995 issue. The column, whose headline or "pull quote" was "'I got trashed and had sex with three guys,'" included a letter from an author identified only as "Mortified." The author of the letter related the events described in the pull quote and sought advice from YM's editor on how to deal with the consequences. The editor responded that the author had made a "major mistake," suggested that she be tested for sexually transmitted diseases and pregnancy, and offered other advice.

In January 1997, Messenger's mother brought this action on her behalf, arguing that Gruner + Jahr violated

Messenger's statutory right of privacy under New York law.[1] Specifically, she contends that Gruner + Jahr's use of Messenger's photograph without proper consent entitles her to recovery under the statute.

In October 1997, Gruner + Jahr moved for summary judgment, arguing that YM's use of Messenger's photographs in the Love Crisis column fits within the broad definition of newsworthy material or material in the public interest. Because New York courts have consistently held that §§ 50 and 51 do not apply in circumstances involving newsworthy material or material in the public interest, Gruner + Jahr argued that it was entitled to judgment as a matter of law. The District Court denied the motion. See *Messenger v. Gruner + Jahr USA Publ'g*, 994 F. Supp. 525 (S.D.N.Y. 1998).

In its opinion, the District Court described the newsworthiness exception and noted that the topic of the column was sufficiently newsworthy to satisfy the exception's requirements. *See* id. at 529. It went on, however, to conclude that New York courts have not permitted application of the newsworthiness exception in cases where the use "is 'infected with material and substantial falsity' " or fictionalization. *Id.* at 529 (quoting *Lerman v. Flynt*

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1. Messenger's complaint also included claims of defamation, negligence, and negligent and intentional infliction of emotional distress. The District Court had, however, dismissed all claims other than the statutory privacy claim relatively early in the case's history and that decision is not at issue on this appeal. See *Messenger v. Gruner + Jahr USA Publ'g*, 994 F. Supp. 525, 527 n.1 (S.D.N.Y. 1998).

Distrib. Co., 745 F.2d 123, 132-33 (2d Cir. 1984), *cert. denied*, 471 U.S. 1054, 85 L. Ed. 2d 479, 105 S. Ct. 2114 (1985)). Because the District Court concluded that a reasonable jury might find that "the publication created the impression that Messenger had had the experiences that were the subject of the column," 994 F. Supp. at 528, the fictionalization limitation on the newsworthiness exception might apply and therefore summary judgment was not appropriate.[2]

The case then proceeded to trial in March 1998, at the conclusion of which a jury found in Messenger's favor, awarding her $100,000 in damages. After the trial, Gruner + Jahr moved for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b) or, in the alternative, for a new trial pursuant to Federal Rule of Civil Procedure 59. The trial court denied both in an unpublished opinion read from the bench, concluding in its decision that the jury had sufficient evidence to reach its substantive conclusions and that the court's decision on summary judgment with respect to the fictionalization exception had been proper.

Gruner + Jahr now appeals on several grounds, and Messenger cross-appeals.

DISCUSSION

The central, dispositive issue in this appeal concerns the proper interpretation of New York Civil Rights Law §§ 50

2. The District Court also rejected Gruner + Jahr's contention that Florida law should apply in the case. See *Messenger*, 994 F. Supp. at 530-31. Gruner + Jahr does not raise this issue on appeal.

and 51. Specifically, this case requires us to determine whether a plaintiff can recover under New York's statutory right of privacy when a publisher uses the plaintiff's image in a substantially fictionalized way to illustrate a newsworthy piece. Because we believe this important issue remains open under New York law, we certify the questions framed below to the New York Court of Appeals.

Sections 50 and 51 permit recovery when "[a] person, firm or corporation . . . uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person." N.Y. Civ. Rights Law §§ 50, 51 (McKinney). There is no dispute in this case that Gruner + Jahr did not obtain adequate consent from Messenger for its use of her photographs. Likewise, the parties agree that Gruner + Jahr used Messenger's image for purposes of trade.

The New York courts, however, have long limited the broad language of the statutes by "consistently refusing to construe the[ ] terms ['advertising' or 'purposes of trade'] as encompassing publications concerning newsworthy events or matters of public interest." *Finger v. Omni Publications Int'l*, 77 N.Y.2d 138, 141-42, 566 N.E.2d 141, 143, 564 N.Y.S.2d 1014, 1016 (1990). In turn, however, the New York Court of Appeals has limited this newsworthiness exception in at least two ways, holding that the use of a name or image is not newsworthy or in the public interest if (1) the use has "no real relationship to the article," or (2) the use "is an advertisement in disguise." *Id.* at 142, 566 N.E.2d at 143, 564 N.Y.S.2d at 1016 (citations and internal quotation marks omitted).

Appendix C

In addition, at least some New York cases appear to have recognized a third limitation to the application of the newsworthiness exception where the use at issue is "infected with material and substantial falsification." *Spahn v. Julian Messner, Inc.*, 21 N.Y.2d 124, 127, 233 N.E.2d 840, 842, 286 N.Y.S.2d 832, 834 (1967); accord *Davis v. High Soc'y Magazine, Inc.*, 90 A.D.2d 374, 382, 457 N.Y.S.2d 308, 315 (App. Div., 2d Dep't 1982); *Fils-Aime v. Enlightenment Press, Inc.*, 133 Misc. 2d 559, 561, 507 N.Y.S.2d 947, 948 (App. Term, 1st Dep't 1986); *Quezada v. Daily News*, 130 Misc. 2d 842, 846, 501 N.Y.S.2d 971, 975 (App. Term, 1st Dep't 1986); see also *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 132 (2d Cir. 1984) (applying the substantial falsity limitation), *cert. denied*, 471 U.S. 1054, 85 L. Ed. 2d 479, 105 S. Ct. 2114 (1985).

Neither party disputes that the column at issue concerns a newsworthy subject — teenage sex and its consequences — particularly in light of the broad definition of newsworthiness applied by New York courts. Cf. *Arrington v. New York Times Co.*, 55 N.Y.2d 433, 440, 434 N.E.2d 1319, 1322, 449 N.Y.S.2d 941, 944 (1982) (noting that for purposes of the newsworthiness exception, "'public interest' [is] clearly a term to be freely defined"). In addition, Messenger concedes that the two well-established limitations to the newsworthiness exception do not apply in the instant case: The use of Messenger's photographs does bear a "real relationship" to the column, and neither the column nor the photographs themselves constitute "advertisements in disguise." Accordingly, the dispositive question is whether there is a third limitation — substantial fictionalization — to prevent application of the newsworthiness exception in

Messenger's case. And, as explained below, we find no clear answer to this question in light of the New York Court of Appeals' 1990 decision in *Finger*.

Finger presented similar facts to those in the instant case: use without consent of a photograph of a family to illustrate an article about a fertilization treatment that the family had never used. See 77 N.Y.2d at 140, 566 N.E.2d at 142-43, 564 N.Y.S.2d at 1015-16. In its opinion, the Court of Appeals engaged in a thorough review of the newsworthiness exception and the exception's two established limitations without mentioning the third: fictionalization. See *id.* at 141-43, 566 N.E.2d at 143-44, 564 N.Y.S.2d at 1016-17. In its discussion, the Court of Appeals relied on a line of New York case law under §§ 50 and 51 that also does not mention the fictionalization limitation. See *id.* (*citing, e.g.*, *Arrington*, 55 N.Y.2d 433, 434 N.E.2d 1319, 449 N.Y.S.2d 941; *Murray v. New York Magazine Co.*, 27 N.Y.2d 406, 267 N.E.2d 256, 318 N.Y.S.2d 474 (1971)).

Several factors suggest that *Finger* may have signaled the end of the fictionalization limitation. First, by itself, the language of the New York Court of Appeals indicates that there are only two limitations to the newsworthiness exception: "Questions of newsworthiness are better left to reasonable editorial judgment and discretion; judicial intervention should occur only in those instances where there is no real relationship between a photograph and an article or where the article is an advertisement in disguise." *Finger*, 77 N.Y.2d at 143, 566 N.E.2d at 144, 564 N.Y.S.2d at 1017 (emphasis added) (internal citations and quotation marks omitted). This language is particularly persuasive in light of

the fact that the parties in *Finger* had briefed the fictionalization issue to the Court of Appeals. Given that the parties squarely presented the issue to the Court, the Court's decision not to mention the argument in its discussion suggests that the fictionalization limitation may no longer exist. Finally, much of the language of the opinion in *Finger* emphasized the broad application of the newsworthiness exception and, by implication, the limited reach of any limitations to the exception. See, *e.g.*, *id.* (noting that "the 'newsworthiness exception' should be liberally applied").

Nevertheless, the Court of Appeals did not explicitly reject the fictionalization exception. More importantly, the Court of Appeals did not overrule *Spahn* or the other earlier cases creating or citing to the exception. Therefore, it is at least possible, as the District Court concluded, that the Court of Appeals in Finger distinguished the case from the line of cases we identified in *Lerman*, rather than rejecting the fictionalization limitation entirely.[3] See *Messenger*, 994 F. Supp. at 530 & nn. 18-19. At least one lower court in New York has interpreted the cases the same way and implicitly concluded that Finger left the fictionalization limitation intact. See *Goldblatt v. Seaman*, 22 Media L. Rep. 2059, 2062, 1994 WL 581499, at *4 (N.Y. Sup. Ct. June 27, 1994); see also *Weber v. Multimedia Entertainment, Inc.*, 1998 U.S. Dist. LEXIS 2, No. 97 Civ. 0682 (PKL), 1998

3. Specifically, the District Court suggested two possible distinctions between *Finger* and the substantial fictionalization cases: (1) "that the use of the photograph in *[Finger]* was not substantially fictionalized," or (2) "that the implication allegedly created by the use of the photograph [in Finger] was not offensive and therefore not actionable." *Messenger*, 994 F. Supp. at 530.

WL 2550, at *3-4 (S.D.N.Y. Jan. 5, 1998) (recognizing the fictionalization limitation).

Therefore, in light of the apparently unsettled state of the law with respect to §§ 50 and 51 after Finger and the decisive issue with which we are confronted, we turn to the New York Court of Appeals for guidance. Our Local Rule § 0.27 permits us to certify to a state's highest court "an unsettled and significant question of state law that will control the outcome of the case pending before this Court."[4] Likewise, title 22, § 500.17(a) of the New York Compilation of Codes, Rules & Regulations permits certification of "determinative questions of New York law . . . for which there is no controlling precedent of the Court of Appeals." We respectfully believe that this appeal presents precisely such a case. As explained above, the continued existence of the fictionalization limitation is an unsettled question after *Finger*, and the outcome of the instant case depends upon a correct answer to that question. Moreover, we recognize that this question is simply too important to New York, with the state's long history as the hub of the publishing industry, for us merely to make an educated guess about the state of the law. This is particularly so given that similar questions have arisen in the recent past and are likely to continue to arise in the future. Therefore, requesting guidance for ourselves and for the other courts that will face these issues in the first instance, we certify the following questions to the New York Court of Appeals:

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4. Although neither party has made a motion to certify the question to the Court of Appeals, the rule explicitly provides that we may do so *sua sponte*. See Second Circuit Local Rule § 0.27.

Appendix C

1. May a plaintiff recover under New York Civil Rights Law §§ 50 and 51 where the defendant used the plaintiff's likeness in a substantially fictionalized way without the plaintiff's consent, even if the defendant's use of the image was in conjunction with a newsworthy column?

2. If so, are there any additional limitations on such a cause of action that might preclude the instant case?

Though certifying to the Court of Appeals the questions as framed above, we also wish to make clear that we have no desire to restrict the Court of Appeals from considering any state law issues that it might wish to resolve in connection with this appeal. Therefore, though our immediate request is for answers to the questions as framed, we would welcome any guidance the Court of Appeals might care to provide us with respect to any state law issues presented by this appeal.

ORDER

This is an appeal from the United States District Court for the Southern District of New York (Lewis A. Kaplan, Judge). After argument and upon due consideration, it is hereby ORDERED that the Clerk of this Court transmit to the Clerk of the New York Court of Appeals a Certificate in the form attached, together with a complete set of briefs, appendix, and record filed with this Court by the parties. This panel retains jurisdiction so that, after we receive a response from the New York Court of Appeals, we may dispose of the appeal. The parties are hereby ordered to bear equally such fees and costs, if any, as may be requested by the New York Court of Appeals.

APPENDIX D — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED AND DECIDED FEBRUARY 24, 1998, AS AMENDED MARCH 13, 1998

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

97 Civ. 0136 (LAK)

JAMIE MESSENGER, an infant under the age of eighteen, by her mother and "next friend" Donna Messenger,

Plaintiff-Appellee-Cross-Appellant,

v.

GRUNER + JAHR PRINTING AND PUBLISHING, also known as Gruner + Jahr USA,

Defendant-Appellant-Cross-Appellee,

and

SALLY LEE, as editor-in-chief of "YM, Young & Modern,"

Defendant.

Decided: February 24, 1998
(as amended March 13, 1998)

LEWIS A. KAPLAN, District Judge.

Appendix D

MEMORANDUM OPINION

Jamie Messenger is a Florida teenager and aspiring fashion model who posed for photographs for use in one of defendant's magazines, YM, Young and Modern. The photographs were used to illustrate a love and sexual advice column that is a regular feature of the magazine. The column in question contained what was presented as a letter from a teenager, identified only as "Mortified," which sought advice in consequence of her having had sex with three boys and then having been ostracized by her peers. The purported letter was followed by the editor's advice to "Mortified." The column was illustrated with three photographs of Messenger in various stages of undress and in poses suggestive of events related in the purported letter. The page prominently featured a headline, or "pull quote," that read "I got trashed and had sex with three guys." The gravamen of the case is plaintiff's contention that the defendants falsely created the impression that Jamie Messenger was the author of the letter and had had sex with three guys. Plaintiff complains also that defendants tricked Messenger as to the use that would be made of the photographs for which she posed and that the purported letter in fact is a work of fiction.

Plaintiff's remaining claim[1] is that the use of her photograph violated Sections 50 and 51 of the New York Civil Rights Law, which forbids the use of one's name, portrait or picture for trade or advertising purposes absent a signed release and creates a private cause of action for damages for violations. In order to place the defendants'

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1. The Court previously dismissed claims for libel, intentional and negligent infliction of emotional distress, and negligence.

summary judgment motion in perspective, it is useful to trace the history of the statute.

In *Roberson v. Rochester Folding Box Co.*,[2] the New York Court of Appeals broadly declared that there is no common law right of privacy in the State of New York and denied recovery to an infant plaintiff whose photograph had been widely distributed by the defendant in order to advertise its baking flour. The Legislature promptly adopted the statute here in question to overturn the holding of *Roberson* by creating a cause of action for the commercial or trade use of one's name or picture without one's consent.[3]

The state courts' subsequent application of the statute has been sensitive to the risk that too broad a construction could interfere with free and open discussion of matters of public concern.[4] They have held that publications concerning matters of public interest — a concept applied most expansively[5] — are not trade or advertising uses. More

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2. 171 N.Y. 538, 64 N.E. 442 (1902).

3. Despite some indications that the New York Court of Appeals would retreat from Roberson and recognize a common law right of privacy, see *Galella v. Onassis*, 353 F. Supp. 196, 227-30 (1972), mod. on other grounds, 487 F.2d 986 (2d Cir. 1973), it steadfastly has declined to do so. *E.g.*, *Howell v. New York Post Co.*, 81 N.Y.2d 115, 123, 596 N.Y.S.2d 350, 354, 612 N.E.2d 699 (1993).

4. *See, e.g.*, *Arrington v. New York Times Co.*, 55 N.Y.2d 433, 440, 449 N.Y.S.2d 941, 944, 434 N.E.2d 1319 (1982).

5. *See, e.g.*, *Weber v. Multimedia Ent., Inc.*, 1998 U.S. Dist. LEXIS 2, No. 97 Civ. 0682 (PKL), 1998 WL 2550, *3 & n.1

(Cont'd)

specifically, the state courts repeatedly have said that the use of a photograph to illustrate an article on a topic of public interest is not actionable "unless [the photograph] has no real relationship to the article . . . or unless the article is an advertisement in disguise."[6] Indeed, as recently as 1990, the New York Court of Appeals held in *Finger v. Omni Publications Int'l, Ltd.*,[7] that the use of a photograph of a large family to illustrate a story on fertility and new fertilization techniques was not actionable despite the fact that the children in the photograph were not conceived by such methods.

(Cont'd)
(S.D.N.Y. Jan. 5, 1998) (teenage prostitution); *Creel v. Crown Publishers, Inc.*, 115 A.D.2d 414, 496 N.Y.S.2d 219 (1st Dept. 1985) (plaintiff's nude photograph taken at a nude beach and used in guide to nude beaches considered newsworthy); *Davis v. High Society Magazine, Inc.*, 90 A.D.2d 374, 457 N.Y.S.2d 308 (2d Dept. 1982) (picture of a well-known female boxer posed nude in a boxing scene "a newsworthy event for a great many people"); *Molony v. Boy Comics Publishers*, 277 A.D. 166, 98 N.Y.S.2d 119 (1st Dept. 1950) (comic book portrayal of plaintiff as a hero in a national disaster newsworthy); *Lahiri v. Daily Mirror*, 162 Misc. 776, 295 N.Y.S. 382 (Sup. Ct. N.Y. Co. 1937) (demonstration of Hindu rope trick found newsworthy).

6. *Murray v. New York Magazine Co.*, 27 N.Y.2d 406, 409, 318 N.Y.S.2d 474, 476, 267 N.E.2d 256 (1971) (quoting *Dallesandro v. Henry Holt & Co.*, 4 A.D.2d 470, 471, 166 N.Y.S.2d 805, 806 (1st Dept. 1957), appeal dismissed, 7 N.Y.2d 735, 193 N.Y.S.2d 635, 162 N.E.2d 726 (1959). See also *Finger v. Omni Publications Int'l, Ltd.*, 77 N.Y.2d 138, 142, 564 N.Y.S.2d 1014, 1016, 566 N.E.2d 141 (1990); *Arrington.*, 55 N.Y.2d at 440, 434 N.E.2d 1319, 449 N.Y.S.2d at 944.

7. 77 N.Y.2d 138, 564 N.Y.S.2d 1014, 566 N.E.2d 141 (1990).

On the other hand, the New York courts have not disregarded the interests of persons victimized by falsehood. In the leading case of *Spahn v. Julian Messner, Inc.*,[8] the New York Court of Appeals held that a star professional athlete would be entitled to recover for the use of his name in an unauthorized biography to the extent that the defendant culpably falsified or fictionalized aspects of his life. More recently, the Appellate Term of the New York Supreme Court in *Fils-Aime v. Enlightenment Press, Inc.*,[9] applied the *Spahn* rule to affirm the denial of a motion for summary judgment dismissing a claim based on the allegedly misleading use of a photograph to illustrate an article on a topic of conceded public interest — the use of a teenager's photograph, taken for other purposes, with an article on child pornography in circumstances that arguably implied that the teenager had been involved in such activities.

These somewhat divergent lines of authority frame the dispute now before the Court. Defendants argue that teenage sex is a matter of public interest and that Messenger's photographs — which, they contend, would have been understood by readers to be photographs of a model rather than of the author of the purported letter from "Mortified" — were reasonably related to their column. Their position therefore is that their actions are protected by the newsworthiness privilege because there was no falsification and, in any case, because *Spahn* and *Fils-Aime* no longer

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8. 21 N.Y.2d 124, 286 N.Y.S.2d 832, 233 N.E.2d 840 (1967), appeal dismissed, 393 U.S. 1046 (1969).

9. 133 Misc. 2d 559, 507 N.Y.S.2d 947 (App. T. 1st Dept. 1986).

reflect the law of New York. The latter contention rests on the fact that *Finger* and other cases have summarized the newsworthiness exception to Sections 50 and 51 without referring to any limitation based on falsification. Plaintiff, on the other hand, contends that the article in question would have been understood by the relevant audience — allegedly teenagers — as implying that Messenger was "Mortified" and that such false and misleading suggestions are actionable, assuming the requisite culpability is established, in view of *Spahn* and its progeny.

One matter is readily disposed of. Plaintiff does not, and in any case could not, seriously dispute that the subject of the column at issue — teenage sex and its consequences — falls within the broad reach of the newsworthiness exception to the statute.[10] Nor does she deny that the use of photographs of a teenager of suitable age and gender is appropriate to illustrate such a column provided that the individual so depicted in fact had the experiences described or, if not, that the photograph is presented with a disclaimer or other clear indication that the individual is a model and not personally the subject of the column. Hence, this Court holds that the subject of the column was a matter of public interest and that the use of the photographs was reasonably related to it. Defendants' motion therefore turns on whether the column was false or fictionalized — that is, whether it implied that "Mortified's" purported letter described Messenger's personal experiences — and, if so, whether defendants are correct in arguing that the fictionalization exception to the newsworthiness privilege does not survive in New York law.

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10. *E.g.*, *Weber*, 1998 U.S. Dist. LEXIS 2, *9, 1998 WL 2550, *3 & n.1 (teenage prostitution matter of public interest).

The first question is not troublesome. The fundamental issue is whether the publication created the impression that Messenger had had the experiences that were the subject of the column, a matter than turns on the interpretation that would be given to the column by readers. The problem is analogous to that presented in libel cases where the question is whether the accused publication is defamatory, and the mode of analysis is the same. The Court initially must determine as a matter of law whether readers reasonably could construe the article in the manner alleged by the plaintiff. If they could, the issue whether they actually did so is for the trier of fact.[11] Although the defendants have pointed out several substantial indications that arguably would lead a reader to conclude that the photographs of Messenger were those of a model and not in fact of "Mortified," the purported author of the letter,[12] the Court is

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11. See *Sutton v. Hearst Corp.*, 277 A.D. 155, 156-57, 98 N.Y.S.2d 233, 234-35 (1st Dept. 1950) (trier of fact must determine whether article was fictionalized); *Marcinkus v. NAL Publishing Inc.*, 138 Misc. 2d 256, 522 N.Y.S.2d 1009 (Sup. Ct. N.Y. Co. 1987) (denying summary judgment because "it cannot be said, as a matter of law, that . . . [the] readers will have no basis for believing that the work is 'anything but fiction' and that there is no connection between the [character in the book] and plaintiff"); *cf. Hicks v. Casablanca Records*, 464 F. Supp. 426, 433 (S.D.N.Y. 1978) (denying preliminary injunction under Section 51 where fictionalization evident to reader); *Goldberg v. Ideal Publishing Corp.*, 210 N.Y.S.2d 928 (Sup. Ct. N.Y. Co. 1960) (upholding complaint where "it appears upon the face of the complaint that the role of the plaintiff, as depicted and represented in the article, in relation to its subject matter, has been wholly fictionalized"). The corresponding libel analysis is described in *Levin v. McPhee*, 917 F. Supp. 230, 236 (S.D.N.Y. 1996).

12. Def. Mem. 14-19.

not prepared on this record to say that this was the only reasonable conclusion.

The question whether the claim nevertheless should be dismissed because New York has abandoned the fictionalization limitation on the newsworthiness privilege is only modestly more difficult. Certainly New York courts have dismissed claims at least superficially similar to, if not as lurid as, plaintiff's. In *Arrington*, the Court of Appeals rejected a claim by a man who complained of the unauthorized use of his photograph to illustrate an article concerning the black middle class despite the fact that plaintiff allegedly did not share traits of those discussed in the article.[13] And, as noted above, it similarly disposed in *Finger* of a claim based on the use of a photograph of plaintiffs' family to illustrate an article on fertility treatments notwithstanding the fact that the children thus depicted had not been conceived by such methods.[14]

Defendants argue that *Finger* and *Arrington* therefore should be taken as overruling the fictionalization rule of *Spahn*, at least with regard to the use of genuine photographs reasonably related to articles concerning matters of public interest. Plaintiff, for her part, points to the fact that the New York courts never explicitly have overruled *Spahn* and its progeny. Moreover, she would distinguish the cases upon which defendants rely on the basis that none involved the

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13. *Arrington*, 55 N.Y.2d at 440, 449 N.Y.S.2d at 944.

14. *See also Alvarado v. K-III Magazine Corp.*, 203 A.D.2d 135, 610 N.Y.S.2d 241 (1st Dept. 1994).

use of photographs allegedly procured by deception as to their intended use.

Although it is far from clear, defendants may be correct in suggesting that there is some tension in the New York case law on this point. *Spahn* and *Fils-Aime* reflect the view that the free speech concerns that warrant broad latitude in permitting newsworthy publications free of Section 50-51 exposure are not implicated with respect to falsehoods if the publisher acts with the requisite degree of culpability. The *Finger-Arrington* line of cases, on the other hand, might be read as cutting in the other direction because there arguably was an element of falsity in the use of the plaintiffs' pictures in those cases. Moreover, plaintiff's proposed distinction of them — which depends not on the impression created by the use of the photograph in juxtaposition with the article, but on the means used to obtain the photograph — is not persuasive. If an individual's photograph has an appropriate relationship to an article concerning a matter of public interest and its use to illustrate that article does not create a false or misleading impression, the free speech concerns that gave rise to the newsworthiness exception to Sections 50 and 51 are implicated irrespective of whether the individual's photograph was obtained by inappropriate means. In other words, the individual conceivably might have an action for fraud, but does not have a claim under the Civil Rights Law. *Per contra*, if the use of the photograph culpably creates a false and misleading impression, no free speech concerns should preclude a claim under the Civil Rights Law even if no improper means were used to obtain the photograph. But while there perhaps is room for debate as to the status of New York law on this point, this Court does not write on a clean slate.

Appendix D

The Second Circuit in *Lerman v. Flynt Distributing Co.*[15] construed New York law as holding that the newsworthiness privilege under Sections 50 and 51 is defeated if the use of the plaintiff's name or photograph is "infected with material and substantial falsity" provided the defendant acted with the requisite degree of fault regarding the variance from the truth.[16] As *Lerman* post-dates all of the cases relied upon by defendants save *Finger*, the question comes down to whether *Finger* overruled the *Spahn-Fils-Aime* line of cases.

Defendants argue that *Finger* must have overruled *Spahn*, at least as applied in circumstances involving the use of photographs for illustrative purposes, because the plaintiff in *Finger* argued that the article falsely implied that the children had been conceived by new fertilization techniques,[17] yet the Court of Appeals, in rejecting the claim, summarized the newsworthiness exception without even referring to the issue of fictionalization. Were there no alternate explanation for the Court of Appeals' decision, the argument might be sufficiently persuasive to warrant dismissal. But that is not the case.

The Court of Appeals in *Finger* very well may have concluded, as the defendant argued,[18] that the use of the

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15. 745 F.2d 123 (2d Cir. 1984)

16. *Id.* at 132-33.

17. Tr. 10-16; Brief for Defendant-Respondent at 30-31, *Finger v. Omni Publications Int'l, Ltd.*, 77 N.Y.2d 138, 564 N.Y.S.2d 1014, 566 N.E.2d 141 (1990); Brief of the Amici Curiae at 22-25, id.

18. Brief for Defendant-Respondent at 30-31, *Finger v. Omni Publications Int'l, Ltd.*, 77 N.Y.2d 138, 564 N.Y.S.2d 1014, 566

(Cont'd)

photograph in that case was not substantially fictionalized, in which case there would have been no need to address the issue of fictionalization. Or it may have accepted the defendant's contention[19] that the implication allegedly created by the use of the photograph there at issue was not offensive and therefore not actionable — unlike the implication of participation in child pornography at issue in *Fils-Aime*.

In view of the alternative explanations for the result in *Finger*, defendants' argument that *Spahn* and its progeny no longer are good law is not persuasive.[20] Certainly it is not sufficiently compelling to convince this Court that *Lerman*, a Second Circuit case closely on point, should be disregarded in favor of an uncertain projection as to the future development of New York law. Accordingly, the motion advances no sufficient basis for dismissal of the claim under Sections 50 and 51 of the New York Civil Rights Law.

(Cont'd)
N.E.2d 141 (1990) (arguing that the photographs at issue in Finger were not 'substantially fictionalized' like the ones at issue in *Fils-Aime, Thompson v. Close-Up, Inc.*, 277 A.D. 848, 98 N.Y.S.2d 300 at 301, and *Metzger v. Dell Publishing*, 207 Misc. 182, 136 N.Y.S.2d 888 at 891).

19. Brief for Defendant-Respondent at 30-32, *Finger*, 77 N.Y.2d 138, 564 N.Y.S.2d 1014, 566 N.E.2d 141 (labeling the Fils-Aime plaintiff's association with child pornography a "highly offensive statement of fact" and distinguishing use of the photographs in Finger as not involving "offensive facts").

20. *Cf. Weber*, 1998 U.S. Dist. LEXIS 2, *14, 1998 WL 2550, *4 (refusing to dismiss claim in view of allegations of fictionalization, albeit without discussing the argument made here).

Appendix D

There remains one final point. This motion was briefed and argued by both sides on the premise that the claim based on alleged commercial or trade use of Messenger's photographs is governed by New York law. Nevertheless, after the motion to dismiss was argued and a decision imminent, defendants submitted a letter suggesting that the Court "sua sponte" apply Florida law, rather than Sections 50 and 51, to plaintiff's claim and dismiss on the theories that Florida law exempts from liability publications on matters of public interest regardless of how fictional the use of a plaintiff's name or likeness may be or, alternatively, that the claim is barred by Florida's single cause of action rule. The argument is without merit.

To begin with, the Court takes exception to the timing of defendants' contention. A court need not consider an argument first advanced in a reply brief.[21] A fortiori, it need not consider an argument first made at an even later point. Nevertheless, it is appropriate to reach the merits here because defendants' failure to raise these issues in moving to dismiss would not preclude them from raising them at trial.[22] The issues therefore must be confronted sooner or later.

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21. *Playboy Enterprises, Inc. v. Dumas*, 960 F. Supp. 710, 720 n.7 (S.D.N.Y. 1997) (collecting cases).

22. The Court would be extremely reluctant to reach the merits in order to grant the motion on the basis of defendants' belated argument because plaintiff has not had a full opportunity to respond. This concern does not apply here in view of the Court's rejection of the contention.

Defendants' first argument is unpersuasive. The Florida statute relied upon[23] is quite similar to Sections 50 and 51 of the New York statute. It differs in that it codifies the newsworthiness exception that in New York is a product of

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23. FLA. STAT. ANN. § 540.08 (West 1997) provides in pertinent part:

> "(1) No person shall publish, print, display, or otherwise publicly use for purposes of trade or for any commercial or advertising purpose the name, portrait, photograph, or other likeness of any natural person without the express written or oral consent to such use given by: (a) Such person; . . .
>
> (2) In the event the consent required in subsection (1) is not obtained, the person whose name, portrait, photograph, or other likeness is so used, or any person, firm, or corporation authorized by such person in writing to license the commercial use of her or his name or likeness . . . may bring an action to enjoin such unauthorized publication, printing, display or other public use, and to recover damages for any loss or injury sustained by reason thereof, including an amount which would have been a reasonable royalty, and punitive or exemplary damages.
>
> (3) The provisions of this section shall not apply to: (a) The publication, printing, display, or use of the name or likeness of any person in any newspaper, magazine, book, news broadcast or telecast, or other news medium or publication as part of any bona fide news report or presentation having a current and legitimate public interest and where such name or likeness is not used for advertising purposes . . . ."

case law by specifically exempting from liability a publication that is "part of any bona fide news report or presentation having a current and legitimate public interest and where such name or likeness is not used for advertising purposes."[24] But the difference is one of form alone. Like the newsworthiness exception in New York law, this provision of the Florida statute protects against "an unconstitutional 'chilling' effect upon the First Amendment freedoms of speech and press."[25] Both therefore exist only to serve the goal of unfettered discussion of matters of legitimate public interest, not to confer a license to engage in the culpable promulgation of falsehood.[26] Thus, while no Florida court appears to have considered the issue, this Court holds that Section 540.08(3) of the Florida Statutes does not foreclose liability for culpably false or fictionalized publications, even on matters of public interest. While the Florida legislature quite appropriately has recognized the need for "breathing space" for publications on matters of public concern, its goal in doing so is fully achieved by precluding liability for innocent errors. There is no reason

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24. *Id.* § 540.08(3)(a).

25. *Loft v. Fuller*, 408 So. 2d 619, 621 (Fla. App. 1981); see also *Valentine v. C.B.S., Inc.*, 698 F.2d 430, 433 (11th Cir. 1983) (Florida law).

26. *See, e.g., Hustler Magazine v. Falwell*, 485 U.S. 46, 52, 99 L. Ed. 2d 41, 108 S. Ct. 876 (1988) (false statements "valueless" and actionable if made with requisite culpability); *Time, Inc. v. Hill*, 385 U.S. 374, 389-90, 17 L. Ed. 2d 456, 87 S. Ct. 534 (1967) (Constitution does not bar liability under N.Y. CIV. RIGHTS L. §§ 50-51 for culpable fictionalization).

to suppose that it intended to immunize deliberate, reckless and irresponsible falsehood.

Nor does the single publication/single cause of action rule under Florida law present a barrier to plaintiff's commercial misappropriation claim. The rule is designed to prevent plaintiffs from circumventing a valid defense to defamation by recasting essentially the same facts into several different causes of action all meant to compensate for the same harm.[27] Here, however, the gravamen of plaintiff's commercial misappropriation claim goes well beyond the injury to reputation that lies at the heart of her defamation claim.[28] Consequently, the defense to plaintiff's defamation claim — her failure to provide notice before filing suit as required by Florida law — does not similarly bar her claim based on the alleged commercial or trade use of her photographs.

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27. See *Orlando Sports Stadium, Inc. v. Sentinel Star Co.*, 316 So. 2d 607 (Fla. App. 1975) (dismissing claims which were essentially alternate theories of injury to reputation).

28. See *Fridovich v. Fridovich*, 598 So. 2d 65, 70 (Fla. 1992) (finding single cause of action rule "will not prevent recovery upon separate causes of action which are properly pled upon the existence of independent facts").

Appendix D

Conclusion

Defendants' motion, to the extent not previously disposed of, is denied.

SO ORDERED.

Dated: February 23, 1998

Lewis A. Kaplan
United States District Judge

APPENDIX E — CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FIRST AMENDMENT

[*Freedom of Religion, of Speech, and of the Press*]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

* * *

FOURTEENTH AMENDMENT

[*Fundamental Federal Rights Not to Be Abridged by States*]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Appendix E

N.Y. Civil Rights Act, § 50. Right of privacy

A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

* * *

N.Y. Civil Rights Act § 51. Action for injunction and for damages

Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the Supreme Court of this state against the person, firm, or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by the last section, the jury, in its discretion, may award exemplary damages. But nothing contained in this act shall be so construed as to prevent any person, firm or corporation, practicing the profession of photography, from exhibiting in or about his or its establishment specimens of the work of such establishment, unless the same is continued by such person, firm or corporation after written notice objecting thereto has been given by the person portrayed; and nothing contained in this act shall be so

construed as to prevent any person, firm or corporation from using the name, portrait or picture or any manufacturer or dealer in connection with the goods, wares and merchandise manufactured, produced or dealt in by him which he has sold or disposed of with such name, portrait or picture used in connection therewith; or from using the name, portrait or picture of any author, composer or artist in connection with his literary, musical or artistic productions which he has sold or disposed of with such name, portrait or picture used in connection therewith.

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APPENDIX F — ARTICLE IN *YOUNG MISS* ENTITLED "LOVE CRISIS" DATED JUNE/JULY 1995

love crisis

"I got **trashed** and had sex with **three** guys"



Wake up and face the facts: You made a pretty big mistake



Agonizing love problems solved by YM's editor

BY SALLY LEE

Dear Sally,

I'm 14, and I started sleeping with my 18-year-old boyfriend about four months ago. Recently he invited me over to his house for a party, but when I got there it turned out that the "party" was just him



Don't try to hurt—just ditch him and his buds

and two of his friends. They kept giving me beers, and I ended up getting really drunk—and having sex with all of them! Even worse, I heard them laughing about it at school the next day.

I feel so dirty and ashamed. How could I have been so stupid?

—*Mortified*

Dear Mortified,

Whoa! No wonder you feel so awful. You've been through a horrible and humiliating experience. But you shouldn't place all the blame on yourself. If you really want to know who should be feeling low-down and dirty, it's your slimy boyfriend and his sleazy friends. It sounds as if they totally set you up. If your boyfriend truly cared about you, he would never have gotten you drunk. Let alone sat back while his friends had sex with you.

"Even worse, I heard them laughing about it the next day."

You deserve a lot better than him. In other words, it's time to dump this zero—like yesterday.

You also need to see a doctor right away to get tested for sexually transmitted diseases and pregnancy. (Even if the guys used condoms, it's always better to be on the safe side and get checked out. If you don't have a gynecologist, call 800-230-PLAN to get in touch with the nearest Planned Parenthood clinic in your area.

Unfortunately, you can't change what happened, but you can learn to take better care of yourself in the future. First, don't get totally smashed. When you drink too much, it can be hard to draw the line between having a good time and getting into trouble. (Besides, from a legal point of view, you're too young to drink, plus, those guys could be arrested for statutory rape for having sex with a minor.) Second, if you feel uneasy about a situation or think that things are getting out of control, just split. Don't ever let anyone intimidate you into sticking around. Make sure to always carry enough cash so that you can call a cab and leave if necessary. Finally, never do anything you don't want to just to please a guy. Your feelings and your safety come first.

Even though you made a major mistake this time, you shouldn't beat yourself up over it forever. But if you can't stop thinking about what happened, you should discuss it with someone you trust, like a close friend, a teacher or a school counselor. Letting your feelings out is the only way you'll be able to learn something from his experience, forgive yourself and get on with your life.



Afraid you're pregnant? See a doctor

Tell me all about your love problem

Tell me all about your love problem. Write to me, Sally, YM's resident expert, c/o LOVE CRISIS, YM, 685 Third Avenue, New York, NY 10017

APPENDIX G — CHARGE TO JURY DATED MARCH 27, 1998

THE COURT: Members of the jury, we have now reached the point in the trial where you are about to enter your final function as jurors in this case. I am sure you all understand that that is one of the most important things we all do in this country as citizens.

This dispute is important to the parties and they place it in your hands.

You have all given very careful attention to the evidence, and I am sure you are going to act together with fairness and impartiality and come to a just verdict.

Now, as I mentioned to you at the beginning of the trial, your job and mine are separate. My job is to instruct you on the law, which I am going to do right now, and you are obliged to accept these instructions on the law as I state them to you, whether you agree with them or not.

My instructions are going to be in four parts. I am going to begin by describing the law to be applied to the facts, as you find the facts, to be established by the proof. Then I will speak to you about the trial process, including the burden of proof. Third, I will give you instructions about evaluating evidence. And, lastly, I will speak to you about how you conduct your deliberations.

Now, as I explained to you at the outset of the trial, this lawsuit is based on a state law that forbids the use of a person's name, portrait or picture, portrayed for commercial or advertising purposes without her consent.

Appendix G

Your verdict in this case is going to be in the form of a series of questions that you will answer in the jury room, principally "Yes" or "No" questions. I will, at the conclusion of these remarks, distribute that form to you. There are only, if memory serves, three questions, and I will tell you what they are as we go along.

The first question asks you to consider whether the Love Crisis column, including the photographs of Ms. Messenger, published in YM magazine, created the false impression that Miss Messenger was the author of the letter signed "Mortified" and thus that she personally had the experiences that "Mortified" described in the letter. Although the article doesn't mention Miss Messenger by name or directly state that the person depicted in the photographs on the page of the article was the person "Mortified," the plaintiff claims that the article was understood to refer to the plaintiff because of the way in which the photographs were used, their positions on the page, and the use of quotation marks in connection with the photographs, among other things. The defendants claim that the photographs were not so understood for a number of reasons, including the argument that readers would not think that someone who described these experiences and signed a letter "Mortified" rather than with her real name would pose for or supply photographs that would disclose her identity. It is for you to decide whether the publication, taken as a whole, created the false impression that Miss Messenger was "Mortified" and, therefore, it had the experiences described by "Mortified" in the purported letter contained in the article.

When considering whether the article and the photographs created such a false impression, you are to

consider the question from the point of view of an average and ordinary reader of YM magazine. That is, you must determine whether average and ordinary YM readers understood the photographs to be of "Mortified," the author of the letter, rather than being photographs of a model used to illustrate the article.

You have heard evidence about how certain people interpreted Miss Messenger's pictures as they were used in the article. For example, the defendants have offered a survey which, they argue, shows how a sample of people to whom the article was shown interpreted the photographs in the article. Both sides have offered evidence of how specific individuals claim to have interpreted it. These pieces of evidence may, if you credit any or all of them, assist you in determining how readers likely interpreted the article and pictures. However, in the final analysis you and you alone are to determine whether the article and the photographs were understood by ordinary and average YM readers as indicating that Miss Messenger was the author of the letter signed "Mortified" and had had those experiences.

If you find that the article was not so understood, then you will answer Question 1 on the verdict sheet "No" and proceed no further.

If you find, instead, that the article and photographs did create the false impression that Miss Messenger was "Mortified," then you will answer Question 1 "Yes" and go on to the next question.

Now, I had intended to pass out the verdict sheets and you would have them in front of you now. It is not quite

ready. But the question simply stated is how you interpret the article, just so you know as I go along.

The second question asks you to decide whether the plaintiff has proved that the defendants acted with the requisite level of culpability. You must answer that question as it relates to each of the two defendants individually.

Now, before I instruct you on Question 2, I want to make one point as it relates to the corporate defendant in this case, Gruner & Jahr, which I am just going to call YM magazine for the rest of these remarks.

In your deliberations on the level of culpability of YM magazine, keep in mind that a corporation may act only through its agents or employees. Any agency or employee of a corporation may bind the corporation by his or her acts and declarations made while the agency or employee is acting within the scope of his or her authority delegated by the corporation or within the scope of his or her duties as an employee of the corporation.

I instruct you that the culpability of an agency or employee may be attributed to the corporation if the agency or employee is acting with the knowledge of the corporation or within the scope of the agency or employment.

Now, Question 2 asks you to decide whether the plaintiff has proved by a preponderance of the evidence that the defendants acted in a grossly irresponsible manner with respect to whether the article and photographs at issue created a false impression about Miss Messenger of the sort I have described already.

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To establish that a defendant acted in a grossly irresponsible manner, the plaintiff must prove that the defendant acted without due consideration for the standards of information dissemination ordinarily followed by responsible parties and by so doing created the false impression that I have spoken of.

If you find that such a defendant acted with gross irresponsibility, then you must answer Question 2 "Yes" as to that defendant. If, however, you find that the plaintiff has failed to prove gross irresponsibility as to a defendant, then you must answer Question 2 "No" as to that defendant.

If you answer Question 2 "No" as to both defendants, you will proceed no further and inform the officer that you have reached a verdict.

In Question 3 you are asked whether you find that the plaintiff has demonstrated by a preponderance of the evidence that she sustained damages as a proximate consequence of the defendants' actions, and, if so, what type of damage and the amount that would fairly and adequately compensate her for any injury that she suffered.

My charge to you on the law of damages must not be taken as a suggestion that you should decide for the plaintiff.

It is for you to decide on the evidence presented and the rules of law that I am giving you whether the plaintiff is entitled to recover from defendants Gruner & Jahr, or YM magazine, and Sally Lee. If you decide that the plaintiff is entitled to recover from the defendants, you must determine

from the evidence before you the total amount of injury suffered by her. Such damages cannot be proved with mathematical accuracy. The aggregate of the amounts you award as fair compensation for each of the items I am going to instruct you about will be your verdict, if you find for the plaintiff. That amount may vary from nominal damages of one dollar, if you find any injury to have been slight, to a substantial sum if You find the injury to have been substantial. You will express that amount in dollars on the verdict form in accordance with the instructions that I am going to explain to you.

I do caution you that these damages, if you do award damages, must not be based on speculation or sympathy. They must be based on evidence presented at the trial and only on evidence.

You first must determine whether Miss Messenger was injured as a proximate consequence of the publication of her photographs in the Love Crisis column of YM. It is important, therefore, that you understand what I mean when I say proximate cause or a proximate consequence. Proximate cause means that there must be a sufficient causal connection between the alleged wrongful conduct by a defendant and any injury or damage sustained by the plaintiff. If you find that the use of the plaintiff's pictures in the article at issue was a substantial factor in bringing about or actually causing pain and suffering or other injury to the plaintiff, then the pain and suffering or other injury was a proximate consequence of the defendants, use of her pictures. The pain and suffering or other injury must be that which a reasonable person would regard as being a consequence of the

defendant's actions and it must have been reasonably foreseeable to a defendant that the pain and suffering or other injury would result from that defendant's actions.

A proximate cause need not always be the nearest cause either in time or in space. In addition, an injury may be a proximate consequence of more than one event. Many factors, or the conduct of two or more people, may operate at the same time, either independently or together, to combine to cause an injury. However, a defendant is not liable if a plaintiff's injury was caused by a new and independent source that intervened between the defendant's act or omission and the plaintiff's injury and that was not reasonably foreseeable to the defendant.

Now, if you find that the plaintiff has been injured as a proximate consequence of the publication of her photographs in the YM Love Crisis column, then you will answer Question 3 "Yes" and go on to consider what type of injuries she suffered and to what extent. If you do not is find that she was injured as a proximate consequence of the publication of the photographs, you will answer Question 3 "no" and proceed no further.

If you answer Question 3 "Yes," the first kind of injury for you to consider is the injury, if any, to Miss Messenger's reputation. That is the subject of part (a) of Question 3.

If you find that the plaintiff has established by a preponderance of the evidence that she suffered injury to her reputation as a proximate consequence of the defendant's actions, then will you determine such amount as in the

exercise of your good judgment and common sense you find is fair and just compensation for any injury to her reputation in her public and private life which you find was directly and actually caused by the defendants' use of her photographs in the manner complained of, and will you write that figure in the space provided in Question 3(a).

In fixing any such amount, you should consider the plaintiff's standing in the community, the nature of the use of her photographs, the extent to which the photographs and article were circulated, the number of YM readers who actually understood the article and photo graphs to mean that Miss Messenger was in fact "Mortified," the tendency of the article to injure such a person as plaintiff, and all of the other facts and circumstances surrounding the parties. If you do not find any such injury — that is, any reputational injury — you will write zero in the space provided in Question 3(a).

Part 3(b) or part (b) of Question 3 asks you to consider whether Miss Messenger suffered any mental anguish and emotional harm as a proximate consequence of the defendant's unconsented to use of photographs. If you find that the plaintiff has established by a preponderance of the evidence that she suffered mental anguish or emotional harm as a proximate consequence of the defendants' unconsented use of her photographs, then you will determine such amount as in the exercise of your good judgment and common sense you find is fair and just compensation for the emotional distress which you find was actually and directly caused by the defendants' use of her photographs in the manner complained of and write that figure in response to Question

3(b). If you do not find such injury was proved, you will write zero in that space.

Finally, in part (c) of Question 3, you are asked to consider whether Miss Messenger suffered any economic injury — that is, that she suffered a loss of income or property — from the defendants, unconsented to use of her photographs. If you find that the plaintiff has established by a preponderance of the evidence that she suffered economic injury as a proximate result of the defendants' use of her photographs, then you will determine such amount as in the exercise of your good judgment and common sense you find is fair and just to compensate her for that injury and fill that in in response to Question 3(c). If you do not so find, you will fill in zero.

There is one additional matter that you are to consider in answering all three parts of Question 3, that is, 3(a), 3(b) and 3(c).

The Court has determined that any consent that may have been given for the use of these photographs in YM magazine was not legally effective to bar this action entirely. Nevertheless, if you find that the defendants have established by a preponderance of the evidence that consent was given, even though it was not legally effective, you may consider that in deciding the amount of damages, if any. In other words, any consent that may have been given, although it is not a complete defense, may be considered in mitigation of damages.

Now, in considering the issue of consent, I instruct you that the only consent relevant here is the consent of either or

both of Miss Messenger's parents, either by their own actions or those of the Page Parkes agency, whom the parties stipulated this morning was authorized to act on Miss Messenger's behalf. The defendants claim that the Messengers or Page Parkes by their conduct evidenced their consent to the use of Jamie Messenger's photographs for this type of illustration as long as she was paid. The plaintiff denies that assertion and maintains that neither the Messengers nor the agency consented to this use.

If you find that Miss Messenger's parents or the agency implicitly consented to the use of these photographs, then you may consider that fact in deciding first, whether to award Miss Messenger zero, nominal, or substantial damages, and, second, if you decide that substantial damages should be awarded, in deciding the amount of such damages.

If, on the other hand, you do not so find, then you will disregard the issue of consent entirely.

The verdict sheet has arrived. Do I want to look at it before you hand it out, Ana? Okay. Please pass it out. I will just pause a minute so you can take a look at the questions. Everybody worked very hard to get this case to you this morning, so that is why this is a little late. The lawyers were here at 7:30 this morning.

Now, that concludes the portion of my instructions that relate to the substantive law that governs this case and that you will apply in deciding it. Now I am going to talk to you about the trial process starting with the burden of proof.

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Some of this will be familiar from my remarks at the beginning of the trial, but that was over a week ago. So, to some modest extent I will be guilty of a little repetition.

The plaintiff has the burden of establishing her position by a preponderance of the evidence on each of the issues that I have alluded to except for mitigation of damages based on consent, for which the defendant bears the burden of proving any such consent by a preponderance of the evidence. As I told you at the outset, the concept of proof beyond a reasonable doubt does not apply to a civil case like this, and you should disregard it altogether.

To establish a fact by a preponderance of the evidence means to prove that the fact is more likely true than not true. A preponderance of the evidence means the greater weight of the evidence. It refers to the quality and the persuasiveness of the evidence, not to the number of witnesses or documents.

In determining whether a claim has been proved by a preponderance of the evidence, you may consider the relevant testimony of all the witnesses, regardless of who may have called them, and all of the relevant exhibits received in evidence, regardless of which side may have is actually offered them in evidence.

If you find that the credible evidence on a given issue is exactly evenly divided between the parties — that is, that it is equally probable that one side is right as the other side is right — then you will decide that issue against the party who has the burden of proof.

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On the other hand, the party that has the burden of proof doesn't have to prove anything more than a preponderance. As long as you find that the scales tip, however slightly, in favor of the party with the burden of proof — in other words, that what that side claims is more likely true than not — then that element will have been proved by a preponderance of the evidence.

Now, as I told you at the beginning, you folks are the sole and exclusive judges of the facts. For that reason, I do not mean to indicate any opinion as to the facts or as to what your verdict should be. The rulings I have made during the trial are not any indication of any views on my part about what your decision ought to be or as to whether or not the plaintiff has proved her case.

I instruct you also that you are to draw no inference from the fact that on occasion I ask questions of some of the witnesses. Those questions were intended only for clarification or to expedite matters, and they certainly were not intended to suggest any opinions on my part as to the verdict you should render or as to whether any of the witnesses may have been more credible or less than anyone else. You are expressly to understand that I have no opinion as to what your verdict will be in this case.

I remind you that it is the duty of the lawyers on each side of a case to object when the other side offers testimony or other evidence which the lawyer believes is not properly admissible. Counsel also have the right and the duty to ask me to make rulings of law and to request rulings at the sidebar out of your hearing. All of those involve questions of law

that are to be decided by me. They do not concern you. You should not show any prejudice against an attorney or the attorney's client because the attorney objected to the admissibility of evidence or asked for a sidebar or asked me to rule on various things during the course of the trial.

I also want to emphasize to you that you are to disregard entirely any instructions or criticisms that I directed at the lawyers. I do that in order better to manage the trial. You are to draw no inferences for or against any party for my actions, which are not to be taken as any indication of any view on my part concerning the outcome of the case.

Now, as I have told you, it is my job to instruct you as to the law and it is your duty to follow my instructions. That is obviously true, as I said, whether you agree with me or not. Moreover, you are to disregard any contrary legal statement that any of the lawyers may have made at any point during the trial.

This case should be considered and decided by you as an action between parties of equal standing in the community, of equal worth, and holding the same or similar situations in life. Individuals and corporations are equal before the law and they are entitled to the same fair treatment at your hands. The mere fact that one of the defendants in this case is a corporation does not mean that it is entitled to any less consideration by you. All litigants are equal before the law, and corporations, whether they are big or small, are entitled to the same fair consideration you would give to anyone else.

I also want you to know, although it is implicit in what I have said so far, that although there are two defendants in

this case it does not follow from the fact that one might be liable that both are liable. Each one of the defendants is entitled to fair consideration, separate consideration, and is not to be prejudiced by the fact that you find against the other, if in fact you do so find.

The evidence in this case, as I told you at the outset of the trial, is the sworn testimony of the witnesses, including the deposition testimony that was read to you or played on the video recorder, the exhibits that were received in evidence and the stipulations between counsel.

The arguments of the lawyers are not evidence because the lawyers are not witnesses. What they have told you in their opening statements and in their closing arguments is intended only to help you understand the evidence and reach your verdict. If your recollection differs as to the facts from what the lawyers told you, it is your recollection that counts. The lawyers' questions are not evidence. It is only the witness' answers that are evidence, not the questions. At times, a lawyer on cross-examination may have incorporated into a question a statement which assumed certain facts to be true — I think every lawyer in this case did that — and asked the witness if the statement the lawyer made was true. If the witness denied the truth of the statement, and if there is no direct evidence in the record proving the assumed fact to be true, then you cannot consider it to be true simply because the lawyer assumed it to be true in the lawyer's questions.

Remember that you are not to consider statements that I struck or told you to disregard. That testimony is not evidence and is not to be considered in reaching your verdict.

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It is for you, and you alone, to decide the weight, if any, to be given to the testimony you have heard and the exhibits you have seen, and for that matter, the stipulations that the parties made.

Now, there are two kinds of evidence that you properly may consider in reaching your verdict.

We call one direct evidence and one circumstantial evidence. Because it is a matter that one hears about on radio and TV and the newspapers, let me just take a brief moment to tell you the difference and to tell you what, if any, significance the difference has.

When I say "direct evidence," I refer to something that a witness testifies about because the witness knows that fact, because the witness perceived it or, with the witness's own senses, it is something the witness saw or heard or felt or touched. Direct evidence can also be in the form of an exhibit where the fact to be proved is the condition or the existence of the exhibit. For example, the photographs all are direct evidence of what was in the photographs.

Circumstantial evidence, on the other hand, refers to the process of proving a disputed fact by proving something else and drawing an inference from the fact that is observable to the fact that is not directly observable.

The example that has been used in this court long before I was born is a very simple one, and it is this:

Suppose we were all in this courtroom. Suppose when we came in it was as beautiful as we all know it was, but the

blinds were pulled and we could not see out. As we are all sitting here people started walking into the room with dripping umbrellas and wet raincoats. You would, in those circumstances, have no direct evidence of what the weather is outside because we can't look out, on this hypothetical. But the dripping umbrellas and raincoats are circumstantial evidence from which you might, by the use of common sense and logical reasoning, deduce that the weather had changed and now it was raining. Of course, it might also mean a pipe burst in the lobby. But that's all we mean when we talk about circumstantial evidence. It is the process of deducing from a known fact another fact, a process of reason and experience and common sense.

Now, having said all that, I tell you that I describe it essentially as a matter of prophylaxis.

Circumstantial evidence is of no less evidence than direct evidence. The law, as a general matter, makes no distinction between direct and circumstantial evidence. It simply requires that your verdict be based on a preponderance of all the evidence presented.

You have heard some testimony from a number of persons who testified as expert witnesses. Two of them, of course, were the psychologist and the psychiatrist respectively. There were, I believe, a couple of others on other subjects.

Experts, unlike other witnesses, are allowed to express opinions on matters about which experts have special knowledge or training. Expert testimony is presented to juries

on the theory that someone who is experienced or knowledgeable in a field can assist you in understanding the evidence or in reaching an independent decision on the facts.

You are to resolve any conflicts there may be in the expert testimony in exactly the same way you decide other fact questions, and in the same way that you decide whether to believe other witnesses and how much weight to attach to their testimony.

In weighing the testimony of the experts, you may consider their qualifications, their opinions, their reasons for testifying, as well as all of the other considerations that you would ordinarily apply in deciding whether or not to believe the testimony of a witness.

You can give that expert testimony whatever weight, if any, you think it deserves in light of all the evidence in the case. You should not, however, accept expert testimony merely because the label "expert" is pinned to it, nor should you substitute it for your own reason, judgment and common sense.

In this case, the defendants presented survey evidence through Mr. Ossip on the issue of whether readers were likely to believe that Miss Messenger was the person who signed the letter "Mortified." You should give this survey the weight to which you think it is entitled, if you think it is entitled to any, just as you will do with all the other evidence in this case.

Among the factors that you may consider in deciding how much weight to give the survey, if any, is:

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(1) whether a fair and unbiased method of questioning the interviewees was used;

(2) whether the data gathered was accurately reported;

(3) whether the sample and the interviews were conducted in a manner likely to produce an unbiased result; and

(4) whether the interviewers in the field were adequately trained and whether or not they knew the purpose for which the survey was being used.

Now, let me say a word on credibility more generally, beyond experts, extending to all the witnesses in the case.

It is, of course, as I have said, up to you to decide how believable you think each witness was in his or her testimony, and that is solely your Job, as is the job of deciding how important you think the testimony of every witness was.

It must be clear to you by now that, at least in some respects, you are being called upon to resolve certain factual issues that the parties have raised in the face of rather different pictures that both sides have painted. In making your judgment about the facts, you should scrutinize carefully all of the testimony of each witness, the circumstances in which the witness testified and any other matter in evidence that may help you decided the truth, accuracy and importance of each witness' testimony.

How do you decide where the truth lies? You should use all of the tests for truthfulness and accuracy that you

would use in deciding that which is important to you in your every day life. You should consider any bias or hostility the witnesses may have shown for or against either party, as well as any interest the witness has in the outcome of the case. You should consider the opportunity the witness had to see, hear and know things about which the witness testified, the accuracy or apparent accuracy of the witness' memory, the witness' candor, or lack of candor, as you perceived it, the witness' intelligence, the reasonableness and probability of what the witness had to say, and the consistency, or lack of consistency of the testimony, its corroboration or lack of corroboration by other credible evidence in the case.

In other words, what you must do in trying to decide credibility is, quite simply, to size up the witnesses in light of their demeanor, what they had to say, and all the other evidence in the case. You are here to use your common sense and your good judgment and your life experience, and that applies to credibility as much as to anything else.

A witness can be discredited, or, to use the lawyer's word, which will be familiar to at least two of you, "impeached" by contradictory evidence, in other words, by evidence that at some other ti me the witness said or did something that is inconsistent with what the witness said in a courtroom. For example, the parties have tried to impeach certain of the witnesses by suggesting that those witnesses gave testimony in their depositions that was inconsistent with what they said here in court.

Evidence of prior inconsistent statements may be considered by you only to help you decide whether to believe

the trial testimony of the witness who contradicted him or herself. In making that determination, you may consider whether the witness purposefully made a false statement or whether it was an innocent mistake; whether the inconsistency concerns an important fact, or simply some small detail; whether the witness had an explanation for the inconsistency, and whether the explanation appealed to your common sense.

It is exclusively your job, based on all the evidence and your own good judgment, to decide whether the prior statement, in your view, really was inconsistent, and, if so, how much, if any, weight to give to the inconsistency in deciding whether to believe all or part of what the witness had to say.

If you believed that any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness whatever credibility, if any, you think it deserves. It a witness is shown to have knowingly testified falsely concerning a material matter in the case, you have a right to distrust that witness' testimony in other respects, and you may, but you are not required, to reject all of the testimony that witness gave. On the other hand, you may also accept any part of that you think is credible and give it the weight you think it deserves.

In evaluating credibility, as I suggested a moment ago, you should, of course, take into account any evidence that a witness might benefit in some way from the outcome of the case. Such interest in the outcome of that character creates a motive to testify falsely or to exaggerate and it may sway a

witness to testify in a way that enhances the witness's own interests. Therefore, if you find that any witness whose testimony you are considering may have an interest in the outcome of the case, then you should keep that in mind when evaluating the credibility of that testimony and accept it with great care.

You should also keep in mind, though, that it does not automatically follow that testimony that is given by an interested witness is necessarily to be disbelieved. There are many people who, no matter what their interest in the outcome of the case might be, would not testify falsely or deliberately exaggerate to you. It is for to you decide, based upon your own perceptions and common sense, to what extent, if at all, the interests of a witness in the outcome has affected the testimony.

Now, the law does not require that either side call as witnesses all persons who might conceivably have been present at some time or place that is involved in the case, or who might appear to have some knowledge of the matters at issue in this case. Nor does the law require anybody to produce as exhibits all papers and things that may have been mentioned in the evidence.

You are not to rest your decision on what some absent witness who was not brought in to testify might have said or might not have said.

I simply close on that point by saying that neither side has an obligation to produce cumulative testimony, fortunately.

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That brings me to the conduct of your deliberations. In just a couple of minutes you are going to retire to decide the case. It is your job as jurors to consult with one another and to deliberate with a view towards reaching an agreement. Each of you must decide the answers to the questions I have framed for yourself, but you should do that only after you consider the case with your fellow jurors, and you should not hesitate to change an opinion if you are convinced that your opinion is erroneous. Your answers to each question must be unanimous, but you are not bound to surrender your honest convictions concerning the effect or the weight of the evidence simply to return a verdict solely because of the opinion of other jurors. Discuss and weigh your respective opinions dispassionately, without regard to sympathy, without regard to prejudice or favor for either party, and adopt that conclusion which in your good conscience appears to be in accordance with the truth.

Of course it goes without saying that a desire simply to be done with it is not a reason to reach a verdict. You should deliberate conscientiously to come to a fair, just and unanimous verdict.

Let me say a word about your notes. The notes you may have taken during the trial are for your personal use only. Each of you may consult your notes during deliberations, but any notes you may have taken are not to be relied upon during deliberations as a substitute for the collective memory of all eight of you. Your notes should be used as memory aide but should not be given precedence over your independent recollection of the evidence. If you did not take notes, you should rely on your own independent recollection,

and you should not be influenced by the notes of other jurors. I emphasize that notes are not entitled to any greater weight than the recollection or impression of each juror as to what the testimony may have been.

I am also going to be sending a copy of these instructions that I am reading to you into the jury room shortly after you retire so that you can refer back to it. I want to caution you, however, that you should consider these instructions as a whole and not focus on any particular part to the exclusion of other parts. They are meant to fit together as a whole.

You should also disregard the legal citations that will be found throughout the instructions. Those are included purely for the convenience of the lawyers and me in formulating the instructions in the first place. They are not of the business of the jury.

When you retire, you should elect one member of the jury as your foreperson. That person will preside over your deliberations and speak for you here in open court. The foreperson will send out any notes, and when you have reached a verdict, the foreperson will notify the marshal or the officer that have you done so.

As have you seen, the verdict form that each of you has consists of questions that concern the important issues in the case. You should answer every question except where the form says otherwise. Please follow the instructions. Please do not add anything that is not called for on the verdict form. Please do not answer questions which under the instructions you are not supposed to answer based on your

earlier answers. I can tell you from experience that that is no help to anybody and all it will do, at best, is to delay matters.

Once you have reached a unanimous decision, you should record your answers on one copy of the verdict form. The foreperson should do that. Each of you then should sign at the bottom and you will advise the marshal that a verdict has been reached.

Do not give the verdict form to the marshal, please. The foreperson should place it in an envelope and bring it with you when you return to the courtroom and hang onto it until I ask you for it.

I stress that each one of you should be in agreement with the verdict when it is announced in open court. Once the verdict is announced by the foreperson in open court and officially recorded, it ordinarily cannot be changed or revoked.

Now, if during your deliberations you want me to discuss further any of the instructions that I have given you, the foreperson should send out a note, through the marshal, in a sealed envelope asking whatever question you may have.

In doing that, I would ask you, should the occasion arise, to be absolutely as specific about the question as you can be, and if you can, to tie it by page number and line numbers to the exact portion of my instructions, which have every line numbered, to which it relates. The reason for that is that if I get a question, I have to consult with the lawyers about their views of what the proper answer is, I have to come to

my own view about the proper answer, and the more precise the question it is and the clearer everybody is as to exactly what is bothering you, the faster we can do that, and the more likely we will be able to answer the first time precisely the question you have in mind.

There was reference in closing argument to having testimony read back. That can be done, but I ask you to request a read back only if you have exhausted your collective recollection and you are sure you need it. If you do conclude that you need to have any of the testimony read back, then, once again, send in a note stating as precisely as you possibly can exactly what you want to hear.

If you can be as specific as this, the witness, the subject, whether it was direct or cross or both, pinpoint it as best you can, because I have to go through the same process with the lawyers, to identify exactly what is to be read back to you, and, moreover, you want to have read back only as much as you really need rather than listening to a much broader read back simply because we understood the question as being broader than you really intended.

We will be sending the exhibits into the jury room with you. That always takes a few minutes, because the lawyers have to check them all and make sure that nothing is being sent in by mistake. So it will take a half hour or so, maybe even a little more, but they are available to you.

Indeed, if you want it, send out a note at any point and we will send the tape player in. I will not have that wheeled in at the start, but if at any point you want to play any of the deposition tapes, just let us know and we will send it in.

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If you do communicate with me before reaching a verdict, you are not to indicate either in a note or verbally here in court how you are divided, in other words, what the vote is, unless I specifically ask you for that information.

Folks, I remind you that you took an oath to render judgment fairly and impartially, without prejudice or sympathy, and without fear, solely on the evidence in this case and the applicable law. I know that you are going to do this and reach a just and true verdict.

There is one other procedural comment I will make and it is this: In order to expedite the rendition of a verdict when it is reached, or the response to any questions or requests for read back, I require the lawyers to remain in or immediately around the courtroom while the jury deliberates, as long as it takes.

I do, in all fairness, have to let them have lunch, so no notes, please, between 12:45 and 2 o'clock, so I can let the lawyers go out and get a bite, especially since they got up so early this morning.

Let me ask you to remain seated for just a moment and I will see counsel for what I trust is the last sidebar.

APPENDIX H — VERDICT DATED MARCH 27, 1998

THE COURT: Who is the foreperson?

THE FOREPERSON: I am, your Honor.

THE COURT: I understand you've reached a verdict?

THE FOREPERSON: Yes, your Honor, we have.

THE COURT: Would you hand it to the clerk, please. Thank you.

(Pause)

THE COURT: The clerk will read the verdict.

THE DEPUTY CLERK: Court Exhibit E.

Question 1: Did the plaintiff establish by a preponderance of the evidence that the article in question was understood by ordinary and average YM readers to mean that Ms. Messenger was the author of the letter signed "Mortified?"

Answer: Yes.

Question 2: Did the plaintiff establish by a preponderance of the evidence that either defendant, in publishing the article, was grossly irresponsible with respect to whether the article would be understood by ordinary and average YM readers to mean that Ms. Messenger was the author of the letter signed "Mortified"?

YM Magazine: Yes.

Sally Lee: No.

Appendix H

Question 3: Did the plaintiff establish by a preponderance of the evidence that Ms. Messenger was injured as a proximate cause of the publication of the article?

Answer: Yes.

3A: If so, what amount would fairly compensate her for injury to her reputation?

Answer: Zero.

3B: If so, what amount would fairly compensate for any emotional injury she suffered?

Answer: 100,000.

3C: If so, what amount would fairly compensate her for the economic injuries she sustained as a result of the defendants' user of her photographs, if any?

Answer: Zero.

APPENDIX I — BRIEF OF *AMICUS CURIAE* SCREEN ACTORS GUILD, INC. DATED SEPTEMBER 22, 1999

COURT OF APPEALS
OF THE STATE OF NEW YORK

JAMIE MESSENGER, an infant under the age of eighteen, by her mother and "next friend" Donna Messenger,

Plaintiff-Appellee-Cross-Appellant,

v.

GRUNER + JAHR PRINTING AND PUBLISHING, also known as Gruner + Jahr USA,

Defendant-Appellant-Cross-Appellee,

and

SALLY LEE, as editor-in-chief of "YM, Young & Modern,"

Defendant.

BRIEF OF AMICUS CURIAE SCREEN ACTORS GUILD, INC. IN SUPPORT OF PLAINTIFF-RESPONDENT-CROSS-APPELLEE

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Attorneys for Amicus Curiae,
SCREEN ACTORS GUILD, INC.

Dated: September 22, 1999

* * *

Appendix I

I.

CORPORATE DISCLOSURE STATEMENT

Pursuant to 22 NYCRR § 500.11(b), the Screen Actors Guild, Inc. states that it is a branch of Associated Actors and Affiliates of America/AFL-CIO, and an affiliate of the International Federation of Actors.

II.

PRELIMINARY STATEMENT OF ARGUMENT AND INTEREST OF *AMICUS CURIAE*

Defendant-Appellants, and their supporting *Amici Curiae*, correctly note New York's traditional tolerance and encouragement of free speech, and that media interests have flourished.

New York, however, is also home to a few performers. The Screen Actors Guild, Inc. ("SAG" or the "Guild") is the national collective bargaining representative for actors, dancers, singers, stunt persons and other performers in the television and motion picture industry. SAG maintains a branch office in New York, and features a number of designated New York representatives as national officers and national board members. Approximately 20,000 SAG-represented employees reside in New York; many of SAG's remaining 76,000 members provide services from time to time in New York, or are employed by entities incorporated or otherwise doing business in New York.

Appendix 1

As performers, SAG-represented employees have a unique interest in the state of the law concerning rights of privacy and publicity, including the right of publicity embodied in Civil Rights Law §§ 50 and 51. For performers, name and image or likeness are essential elements in structuring a career. Indeed, development of a marketable persona is an initial goal in seeking to obtain employment as an actor or in other areas. Misappropriation of name, image or likeness can derail or even destroy a performer's career, as economic opportunities are foreclosed, often to the benefit of others.

The plight of Jamie Messenger provides a cautionary tale for all performers who face the risk of misappropriation. Many performers — celebrities and non-celebrities alike — could find themselves in Messenger's situation, to deleterious effects upon their careers.

On behalf of such performers, SAG respectfully asks this Court to sustain its commitment to a test for "fictionalization" in the context of Civil Rights Law §§ 50 and 51. This fictionalization test provides a necessary check on media interests that might otherwise abuse their status as *de facto* determinants of "newsworthiness" sufficient to negate an otherwise colorable claim for misappropriation. In the absence of such a test, irresponsible media interests may be unable to resist opportunities to enhance financial performance by linking performers to fictionalized materials, or using performers' images in a fictionalized way, which triggers the harmful effects of misappropriation, but leaves performers — and other citizens — without a remedy.

Appendix I

III.

ARGUMENT

A. UNAUTHORIZED USE OF NAME, PORTRAIT OR IMAGE IS A CRUCIAL ISSUE FOR PERFORMERS AND OTHER PERSONALITIES, FOR WHOM THEIR IMAGE IS THEIR STOCK-IN-TRADE.

The ability to exert some control over the manner in which a name, image or likeness is displayed or otherwise exploited is a matter of critical interest to performers. Those who have attained the status of "celebrities" have succeeded in creating an image or persona that has commercial value based "on that person's public visibility and the characteristics for which he or she is known." *Lugosi v. Universal Pictures*, 25 Cal. 3d. 813, 835 (1979) (C.J. Bird, dissenting). For performers or other individuals who have not achieved celebrity status, commercial and dignitary interests may nonetheless be recognized and protected through control over the ability of others to exploit an image or likeness.

Indeed, New York Civil Rights Law §§ 50 and 51 (the "Statutes"), were first enacted in 1903 as a legislative response to this Court's decision in *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902), in which it rejected a claim based on the use of Ms. Roberson's picture to advertise flour. Ms. Roberson was not a "celebrity," and in suing for relief, she emphasized her distaste for the "impertinence" with which her image was appropriated, and the publicity resulting from use of her image. *Id.* at 543, 64

N.E. at 443. The resultant statute, entitled "Right of Privacy," thus protects against the mental and subjective injury to feelings and peace of mind that occurs when an image or likeness is used without consent. Any individual subjected to misappropriation of name, image or likeness can sustain these injuries.

But the Statutes also protect individuals from other harms, which are of particular importance to performers whose name, image or likeness may be imbued with commercial value. This commercial value results from an investment of personhood that may include development of talent through training in dramatic performance, physical conditioning, and, with luck, cultivation of an image or persona that engenders work opportunities. Indeed, a performer's primary asset is his or her personhood and the ability to channel that personhood into performances or a persona that can generate further economic opportunities as an actor or in some other capacity.

An actor's ability to become the physical manifestation of an idea is the essence of the actor's craft. It is this ability to project ideas or a particular sensibility through an image, likeness or voice that in large measure provides performers with their value as commercial icons. Simplistic examples would include commercial use of an actor with a bodybuilder physique to express an image of toughness, or an avuncular elder actor to tout products associated with inevitable physical decrepitude. If a performer is also a celebrity, then the performer's name will have corresponding commercial value. But non-celebrity performers may also display

qualities that endow their image with commercial value, and the correlative threat of misappropriation.

Misappropriation denies performers the ability to enjoy the benefits of their labor. In measuring Ohio's statutory right of publicity against an asserted constitutional right to broadcast a "human cannonball" act in its entirety, the U.S. Supreme Court noted this injustice, and the analogy between rights of privacy or publicity and patent or copyright law as a means toward state encouragement of creative endeavors:

> [T]he state's interest in permitting a "right of publicity" is in protecting the proprietary interest of the individual in his art in part to encourage such entertainment . . . [and is] closely analogous to the goals of patent and copyright law, focusing on the rights of the individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation.
>
> * * * * *
>
> [W]e are quite sure that the First and Fourteenth Amendments do not immunize the media. . . . The Constitution no more prevents a State from requiring respondent to compensate [defendant] for broadcasting his act on television than it would privilege respondent to film and broadcast a copyrighted dramatic work without liability to the copyright owner.

Zacchini v. Scripps-Howard Broadcasting Company, 433 U.S. 562, 572, 575, 53 L.Ed 2d 965 (1977). While the

Zacchini majority stressed the media's broadcast of Hugo Zacchini's entire act, the basic principle certainly applies to misappropriating *any* marketable aspect of an individual's persona:

> "The rationale of [protecting the right of publicity] is the straightforward one of preventing unjust enrichment by the theft of goodwill. No social purpose is served by having the defendant get free *some aspect of the plaintiff that would have market value and for which he would normally pay.*"

Zacchini, 433 U.S. at 576 (quoting *Kalven, Privacy in Tort Law: Were Warren and Brandeis Wrong?* 31 Law & Contemp. Prob. 326, 331 (emphasis added) (1966)).

The benefits of protecting such activity redound not only to the protected individual, but also to society at large:

> While the immediate beneficiaries are those who establish professions or identities which are commercially valuable, the products of their enterprise are often beneficial to society generally. Their performances, inventions and endeavors enrich our society, while their participation in commercial enterprises may communicate valuable information to consumers.

Lugosi, 25 Cal. 3d at 840 (Bird, C.J., dissenting).

Appendix I

Without the protection of provisions like the Statutes, performers and other individuals are subject to the "theft of goodwill" noted by the U.S. Supreme Court, *Zacchini*, 433 U.S. at 576, and may be the victims of unjust enrichment as others directly profit from unauthorized exploitation of the performer's labor, effectively denying the performer any opportunity to exploit his or her own image.

Performers may also be subjected to substantial indirect consequences. Loss of control over the nature of exploitation may lead to dilution of value where an image is over-exposed. *See* Mark F. Grady, *A Positive Economic Theory of the Right to Publicity*, 1 UCLA Ent. L. Rev. 97, 109 (1994). Unauthorized exploitation may derail marketing plans or other time-sensitive aspects of image management thereby wrestling control from the performer. Dissemination of unauthorized images may lead to distortions of a performer's public image that tarnish or dilute the image so that potential employers or licensees are no longer willing to use the performer's services or images for dramatic or endorsement purposes. The value of such unauthorized images may effect a reaction that has a negative effect on the performer's career. Losses "may well exceed the mere denial of compensation for the use of the individual's identity — [a]s a result, the development of his initial vocation — his profession — may be arrested." *Lugosi*, 25 Cal.3d at 835 (Bird, C.J., dissenting).

The facts of the case before this Court reflect many of these phenomena. Regardless of whether or not "YM, Young & Modern" is a purveyor of news, or whether or not the story of "Mortified's" drunken encounter with three men is "newsworthy," there is no question that Gruner + Jahr

Appendix I

Printing and Publishing is an enterprise that attempts to turn a profit through its activities.[1] While Ms. Messenger may have been paid for her photo shoot, she certainly did not consent to linkage of her image with printed matter that would lead readers to conclude she was the misguided soul who succumbed to the "facts" related by "Mortified." Through this misappropriation of image and likeness, Defendant-Appellant has wreaked havoc on a modeling career by distorting the professional image Messenger has otherwise sought to create, and may have brought that career to a screeching halt. There may have been further unpleasant repercussions unrelated to Ms. Messenger's career.

Because the press and media have the power to effect this sort of result, it is critical that this Court consider not only the First Amendment interests asserted by Defendant-Appellant and their supporting *amici curiae*, but the interests of performers, personalities, and regular citizens who run the risk of exploitation through unauthorized use of images and likeness. As noted by the Supreme Court, Appellate Division, Second Department in *Davis v. High Society Magazine, Inc.*:

> [a] statute of this kind is not "to be obeyed grudgingly, by construing it narrowly and treating

1. This is not to say the mere fact of commercial enterprise automatically transforms use of name or likeness into a commercial use. *Stephano v. News Group Publications, Inc.*, 64 N.Y.2d 174, 181-185, 475 N.Y.S.2d 220, 225 (1984). But there is no question that magazines like "YM, Young & Modern" function in an industrial context that commodities talent and personalities in a manner far different from the traditional conception of "news."

it as though it did not exist for any purpose other than that embraced within the strict construction of its words." It is "not an alien intruder in the house of the common law, but a guest to be welcomed as a new and powerful aid in the accomplishment of its appointed task of accommodating the law to social needs" ' " (*Flores v. Mosler Safe Co.*, 7 N.Y.2d 276, 281, 196 N.Y.S.2d 975, 164 N.E.2d 853, quoting Justice SHIENTAG in *Lahiri v. Daily Mirror*, 162 Misc. 776, 779, 295 N.Y.S. 382; see, also, *Spahn v. Julian Messner, Inc.*, 18 N.Y.2d 324, 327-328, 274 N.Y.S.2d 877, 221 N.E.2d 543, on rearg. 21 N.Y.2d 124, 286 N.Y.S.2d 832, 233 N.E.2d 840). Thus, while it remains true that "New York recognizes no right to judicial relief for the invasion of privacy beyond protection from the commercial misappropriation expressed in sections 50 and 51 of the Civil Rights Law" (*D'Agostino v. Pan Amer. World Airways*, 79 A.D.2d 646, 647, 433 N.Y.S.2d 823), it is also the case that the courts have broadly construed what constitutes commercial misappropriation of a person's name or picture under the statutes (see *Time, Inc. v. Hill, supra*, 385 U.S. at pp. 381-387, 87 S.Ct. At pp. 538-541 and cases cited therein).

Davis v. High Society Magazine, Inc., 90 A.D.2d 374, 378, 457 N.Y.S.2d 308, 313 (App. Div. 1982). Freedom of the press is robust enough to sustain consideration of broader societal considerations as suggested by this approach to the Statutes.

B. FREEDOM OF THE PRESS DOES NOT OBVIATE MEDIA OBLIGATIONS TO EXERCISE SUCH FREEDOM IN A RESPONSIBLE MANNER.

SAG in no way seeks to deny the importance of free speech. The First Amendment, and Article I, Section 8 of the New York State Constitution, provide clear guidance concerning the primacy of such interests.

However, such freedom is not entirely untrammeled. While Article I, Section 8 does indeed grant every citizen of New York the right to "freely speak, write and publish his sentiments on all subjects," each such citizen is "*responsible for abuse of that right. . . .*" (Emphasis added). As this Court noted in *Gaeta v. New York News, Inc.*, 62 NY.2d 340, 349, 477 N.Y.S.2d 82, 85 (1984) (emphasis added):

> Determining what editorial content is of legitimate public interest and concern is a function for editors. . . . The press, *acting responsibly*, and not the courts must make the ad hoc decisions as to what are matters of genuine public concern, and [are] subject to review. . . .

Similarly, in *Howell v. New York Post Co.*, 81 N.Y.2d 115, 124, 596 N.Y.S.2d 350, 355 (1993) and *Finger v. Omni Publications International, Ltd.*, 77 N.Y.2d 138, 143, 564 N.Y.S. 2d 1014, 1017 (1990), this Court noted that editorial judgment must be exercised in a "*reasonable*" manner.

While few judges would relish the prospect of micro-managing the editorial process throughout the mass media,

this Court and others have established parameters by which the media can evaluate whether exercise of editorial freedom is conducted in a reasonable manner. Consider, for example, the well-developed doctrine of defamation, by which concerns for freedom of speech are reconciled with tort law in a manner intended to ensure the media act responsibly, without chilling free speech.[2]

Similarly, SAG respectfully asks this Court to recognize its corresponding success in such reconciliation through the fictionalization exception to the "newsworthiness" rule, such that unauthorized use of an image or likeness may be privileged in the context of newsworthy events or matters of

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2. *See, generally, Goertz v. Welch*, 418 U.S. 323, 41 L.Ed.2d 789 (1974); *Time v. Hill*, 385 U.S. 374, 17 L.Ed.2d 456 (1967); *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 379 N.Y.S.2d 61 (1975). Similarly, while Defendant-Appellant suggests false light claims do not pass constitutional muster (Brief of Defendant-Appellant at 36), jurisdictions that, unlike New York, *do* recognize the tort of false light invasion of privacy have managed to successfully reconcile this cause of action with First Amendment considerations through the standards for knowledge of falsity that were enunciated by the U.S. Supreme Court in *Goertz* and *Hill*. *See, generally*, McCarthy, *The Rights of Publicity and Privacy*, § 5.12(e) (1999). No constitutional flaw exists solely because Civil Rights Law § 51 might in certain circumstances facilitate injunctive relief. Finally, Defendant-Appellant's efforts to color this case as a "false light" case is a red herring; while New York may not recognize false light invasion of privacy, the fact that this case might sound in that cause of action in other jurisdictions is irrelevant to the question of whether the facts of this case also happen to constitute violation of the Statutes in accordance with long-received precedent. Simply put, "false light" and violation of Civil Rights Law §§ 50 and 51 are not mutually exclusive.

public interest, except where the use is infected with substantial fictionalization or falsification.

1. *This Court Has Long Recognized That Fictionalization Vitiates Newsworthiness .*

In *Binns v. Vitagraph Co. Of America*, 210 N.Y. 51, 103 N.E. 1108 (1913), this Court first confronted application of the Statutes to circumstances where a media interest was accused of fictionalizing some element of a presentation incorporating unauthorized usage of the Plaintiff's image. In *Binns*, a real-life hero who refused to appear on stage or in movies found himself depicted on screen by an actor who, in the first four series of pictures, acted out an accident and rescue at sea loosely based on Plaintiff's accomplishments, but in the last series depicted the Plaintiff as acting to amuse the audience. This Court found Vitagraph to have used Binns' image as a matter of business and profit contrary to the Statutes. In subsequent discussion, this Court explicitly noted that Binns "was entitled to protection against fictionalization of his exploit, and the use of his name and personality for mere commercial, as distinguished from news, purposes." *Gauther v. Pro-Football, Inc.*, 304 N.Y. 354, 360; 107 N.E.2d 485 (1952).

The fictionalization test was clearly articulated in *Pagan v. New York Herald Tribune*, 32 A.D.2d 341, 343, 301 N.Y.S.2d 120, *affd.* 26 N.Y.2d 941, 310 N.Y.S.2d 327 (1969), in which this Court affirmed that a publication could be found to be made for purposes of trade based either on lack of a reasonable connection between the use and a matter of public interest, or on a finding that the use contained

substantial fictionalization or falsification. And in the leading case of *Spahn v. Julian Messner, Inc.* 18 N.Y.2d 324, 274 N.Y.S.2d 877 (1966), *vacated* 387 U.S. 239, 18 L.Ed.2d 744, *reaffirmed* 21 N.Y.2d 124, 286 N.Y.S.2d 832 (1967), *appeal dismissed*, 393 U.S. 1046, 21 L.Ed.2d 600 (1969), this Court twice held that a star baseball pitcher would be entitled to recover for the use of his name in an unauthorized biography to the extent that the defendant culpably falsified or fictionalized aspects of his life:

> We hold in conformity with our policy of construing sections 50 and 51 so as to fully protect free speech, that, before recovery by a public figure may be had for an unauthorized presentation of his life, it must be shown, *in addition* to the other requirements of the statute, that the presentation is infected with material and substantial falsification and that the work was published with knowledge of such falsification or with a reckless disregard for the truth.

Id., 21 N.Y.2d at 127, 286 N.Y.S.2d at 842.[3]

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3. While not binding, this Court's vacated decision in this matter is nonetheless instructive:

> The factual reporting of newsworthy persons and events is in the public interest and is protected. The fictitious is not. This is the heart of the cases in port (*Hill v. Hayes*, 15 N.Y.2d 986, supra; *Koussevitzky v. Allen, Towne & Heath*, 188 Misc. 479, aff'd. 272 App.Div. 759, supra; *Goelet v. Confidential, Inc.*, 5

(Cont'd)

Based on these cases and other decisions by courts of this State, *see, e.g., Davis v. High Society Magazine*, 90 A.D.2d 374, 381, 457 N.Y.S.2d 308 (1982), the current understanding of the fictionalization rule is best stated in *Fils-Aime v. Enlightenment Press, Inc.*, 133 Misc.2d 559, 507 N.Y.S.2d 947, 948 (App.T. 1st Dept. 1986):

> . . . an exception to the newsworthy privilege is recognized where it is shown that there is no real relationship between the use and the subject matter of the article or that the use was infected with substantial fictionalization or falsification. . . .

If this is the case, and if the media interest acted in a "grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties," then the media interest may be held liable. *Id.*, 133 Misc.2d at 561, 507

(Cont'd)

A.D.2d 226, supra; *Youssoupoff v. Columbia Broadcasting System*, 19 A.D.2d 865).

> The plaintiff's status as a public figure makes him newsworthy and thus places his biography outside the protection afforded by the statute. But the plaintiff does not seek an injunction and damages for the unauthorized publication of his biography. He seeks only to restrain the publication of that which purports to be his biography.

Id., 18 N.Y.2d at 328, 271, N.Y.S.2d at 879-80.

N.Y.S.2d at 949, *quoting Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 199, 379 N.Y.S.2d 61.

This understanding of the fictionalization exception has also been tracked by Federal courts addressing New York law. *See, e.g., Lerman v. Flynt Distributing Co., Inc.*, 745 F.2d 123 (2nd Cir. 1984); *Messenger by Messenger v. Gruner + Jahr USA Publishing*, 994 F.Supp. 525 (S.D.N.Y. 1998); *Nelson v. Globe International, Inc.*, 626 F.Supp. 969 (S.D.N.Y. 1986); *Weber v. Multimedia Entertainment*, S.D.N.Y. 97 Civ. 0682 (JGK) decided August 6, 1998 [a copy of which is annexed to Brief of Plaintiff-Respondent herein.]

Application of the fictionalization/falsification test to the facts of this Case clearly demonstrates liability for violation of Civil Rights Law §§ 50 and 51. Assuming the story of "Mortified" is newsworthy, and even assuming that the letter from "Mortified" is not in itself a work of fiction, there can be no question — and a jury so found — that juxtaposition of Plaintiff-Respondent's photograph with the letter was false and misleading, as Plaintiff had no connection with the subject matter of the letter. This is no different from *Fils-Aime*, where plaintiff had no connection with an article on child pornography, and juxtaposition of her photograph with that article was false and misleading.

2. *Unlike the Instant Case, Recent Decisions by this Court Did Not Require Consideration of Fictionalization, and Those Decisions Do Not Indicate Rejection of the Fictionalization Test.*

Defendant-Appellant, and *amici curiae* in support thereof, suggest that the fictionalization test has been rejected by this Court because no mention of this test is made in certain recent decisions. This is nonsensical, as in each such case this Court simply did not have to reach the question of fictionalization.

In *Howell v. New York Post Co.*, 81 N.Y.2d 115, 596 N.Y.S.2d 350 (1993) there was no allegation of any falsity or fictionalization in photographic linkage between plaintiff and a fellow hospital patient, and this Court simply concluded that publication of that photograph in the context of an article about the fellow patient bore a "real relationship" to the newsworthy article.

In *Murray v. New York Magazine Co.*, 27 N.Y.2d 406, 318 N.Y.S.2d 474 (1971); *Arrington v. New York Times Company*, 55 N.Y.2d 433, 449 N.Y.S.2d 941, *reh'g denied*, 57 N.Y.2d 669, 454 N.Y.S.2d 75 (1982) *cert. denied*, 459 U.S. 1146 (1985); and *Finger v. Omni Publications Int'l.*, 77 N.Y.2d 138, 564 N.Y.S.2d 1014 (1990), this Court was presented with the same essential fact pattern. In each of these cases, a plaintiff sought redress under the Statutes because of publication of a photograph in conjunction with a newsworthy article with which the plaintiff did not want to be associated. Arrington was photographed on the street as emblematic of the "black middle class," but did not want

to be associated with the cohort described in the article. Murray was photographed while attending a St. Patrick's Day parade in full regalia, but not being Irish, was displeased about the photograph being linked with an article entitled "The Last of the Irish Immigrants." A photograph of the Finger family was tied to an article about research concerning linkage between caffeine and *in vitro* fertilization, which offended the Fingers insofar as they had no relationship to the practices described in the article.

In each of these cases, this Court found no violation of the Statutes because each photograph bore a "real relationship to the article," and none of the articles constituted "advertisements in disguise." While each plaintiff resisted juxtaposition of photographs to articles, there was no allegation that any of the articles were fictionalized or falsified in any way. Indeed, Murray was found to "voluntarily have become part of the spectacle" on St. Patrick's Day, a presence that "constituted a visual participation in a public event which invited special attention." *Murray*, 27 N.Y. 2d at 409, 318 N.Y.S. 2d at 476. Similarly, the photographs of Arrington and of the Finger family depicted each in the normal course of day-to-day life. In other words, stock photographs of everyday people going about their business were deemed illustrative of certain articles, and this Court found each photograph to bear a real relationship to the theme of each newsworthy article. In each case, there was no allegation that the articles were somehow false, or that the photographs were not natural depictions of each plaintiff. Under such circumstances, this Court had no need to address the question of fictionalization.

However, the instant case demands consideration of that issue. Ms. Messenger was not photographed while holding herself out to the public in plain view during the course of her daily life. Instead, performing as a model, she was instructed to pose "in various states of undress and in poses suggestive of events related in the purported letter." *Messenger*, 994 F.Supp. at 526. This process in itself creates a degree of fictionalization simply not found in *Arrington*, *Finger* or *Murray*.[4] Nor is it clear whether the letter from "Mortified" reflects truth or fiction. And Messenger certainly did not consent to the manner in which these photographs were employed.

Moreover, the degree of "real relationship" between photograph and article that is found in *Murray*, *Arrington* and *Finger* is entirely lacking. Arrington was certainly representative of the black middle class; the Finger family was representative of a large, healthy family; and Murray, in full Irish regalia, held himself out as a representative Irishman. But there is no similar relationship between Messenger and the purported victim of teenage drinking and group sex, who is told by an editor that she may be pregnant and subject to venereal disease.

To compound matters, the images of the Fingers, of Arrington, and of Murray were linked to articles that dealt

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4. While this Court rejected a § 50 claim by a model in connection with photographs relating to a fashion shoot, there was no allegation that the photographs, or their linkage to descriptive material concerning a jacket worn by the model, were fictionalized or false in any way. *Stephano v. News Group Publications, Inc.*, 64 N.Y.2d 174, 181-185, 475 N.Y.S.2d 220, 225 (1984).

with groups of people, and that did not attempt to link those images with any specified individual within each article. Nor did any of these articles make reference to the respective plaintiff or their photographs. In contrast, Messenger's image was tied to an article purporting to detail the experience of a single individual, which necessarily raises an implication of identity between image and article that is lacking in *Finger*, *Arrington* and *Murray*. And it bears remark that Messenger's image was linked to an article imputing a loathsome disease and serious sexual misconduct: acts that are generally classed as triggering "slander per se." Restatement of Torts, Second, §570 (1977); Prosser & Keeton, The Law of Torts, § 112 (5th ed. 1984).

Howell, *Stephano*, *Arrington*, *Finger* and *Murray* raised no issues concerning falsification or fictionalization. Accordingly, this Court simply had no reason to consider such issues in these cases, and reached no decision that altered its existing doctrine, under *Spahn* and prior cases, concerning fictionalization. Under these circumstances, there can be no question that the fictionalization exception to newsworthiness found in *Spahn* remains good law.

3. *Elimination of the Fictionalization Test would Facilitate Irresponsible Media Practices.*

If this Court were to eliminate the fictionalization exception to newsworthiness in connection with the Statutes, citizens of New York would face the prospect of irresponsible editorial decisions that gravely harm economic and other interests, but for which there would be no remedy.

Appendix I

"Newsworthiness" presumes "news," which in turn incorporates standards of journalistic practice intended to ensure responsible journalism. For example, in the realm of defamation law, and through extension to the Statutes:

> . . . where the content of the article is arguably within the sphere of legitimate public concerns, which is reasonably related to matters warranting public exposition, the party defamed may recover; however, to warrant such recovery he must establish, by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards or information gathering and dissemination ordinarily followed by responsible parties.

Chapadeau, 38 N.Y.2d at 199, 379 N.Y.S.2d at 64.

"News" may not always be "true," as unfolding events are sometimes difficult to interpret or discern. Nor will true fiction, satire and the like be subject to "the stricture of the Civil Rights Law." *Davis*, 90 A.D.2d at 382, 457 N.Y.S.2d at 315. But to permit names, images or portraits to be misappropriated where "knowing fictionalization" has occurred:

> . . . would amount to granting a literary license which is not only unnecessary to the protection of free speech, but destructive of an individual's right — albeit a limited one in the case of a public

figure — to be free of the commercial exploitation of his name and personality.

Spahn, 21 N.Y.2d at 129, 286 N.Y.S.2d at 836.

As the U.S. Supreme Court noted in analyzing the Statutes in *Time v. Hill*:

> . . . constitutional guarantees can tolerate sanctions against *calculated* falsehood without significant impairment of their essential function. We held in New York Times that calculated falsehood enjoyed no immunity in the case of alleged defamation of a public official concerning his official conduct. Similarly, calculated falsehood should enjoy no immunity in the situation here presented us. What we said in *Garrison v. Louisiana*, supra, at 75, 13 L ed 2d at 133, is equally applicable:
>
> > "The use of calculated falsehood . . . would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published . . . should enjoy a like immunity. . . . For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which

> economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .' *Chaplinsky v. New Hampshire*, 315 US 568, 572 [86 L ed 1031, 1035, 62 S Ct 766]. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

Time v. Hill, 385 U.S. at 389-390, 17 L.Ed.2d at 468.

New York's fictionalization rule in connection with the Statutes provides precisely the protection required to ensure that irresponsible media elements cannot take advantage, and implements the New York Constitutional mandate under Article 1, Section 8, that the press be held "responsible for abuse" of the right to speak and publish freely. Adherence to the fictionalization rule will not bring media operations to a halt, nor will it impermissibly affect editorial judgment. Adherence *will* effectuate the responsibilities that accompany the great freedom enjoyed by the media in this State.[5]

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5. For general discussion concerning the relationship between the law of New York and other states in connection with rights of privacy and publicity, *see* McCarthy, *The Rights of Publicity and Privacy*, § 6.9 (1999).

III.

CONCLUSION

SAG requests that this Court endorse the interpretation of Civil Rights Law § 50 presented by the District Court below. Otherwise, the legitimate interest of performers in controlling exploitation of persona which exist through the actor's investment of personhood — and the interest of all New York citizens whose name, image or portrait might be misappropriated — will be eviscerated.

Dated: September 22, 1999

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By: /s/
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Supreme Court, U.S.
FILED
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(2)

No. 99-1915

IN THE

Supreme Court of the United States

JAMIE MESSENGER,

Petitioner,

v.

GRUNER + JAHR PRINTING AND PUBLISHING,
also known as GRUNER + JAHR, USA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF

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The petition for certiorari in the case at bar was docketed on May 31th. [# 99-1915]. No opposition papers have been filed. The matter is pending. *Paramount v. Wendt* [#99-1567], also pending before this Court, involves similar issues, and demonstrates that the Circuit Courts are in conflict over exploitation of the Constitutionally protected property interests and livelihood of models and entertainers under *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, at 574 (1977).

Petitioner first learned of *Paramount v. Wendt* in an article in the *L.A. Daily Journal*, July 17, 2000, Vol. 113, No. 137, page 1, and thus could not be proffered in the original petition.

SUPPLEMENTAL POINTS IN SUPPORT OF PETITION

I. THE NINTH CIRCUIT AND SECOND CIRCUIT HAVE REVIEWED SIMILAR ISSUES, YET FORMULATED ANTITHETICAL OUTCOMES WITH RESPECT TO CONSTITUTIONALLY PROTECTED PROPERTY INTERESTS.

In *Wendt*, Paramount argues that a copyright owner may license others to use robots that emulate characters in the television sitcom "Cheers," without any regard for the privacy and publicity rights of the actors themselves. The actors argue that it is the physical likeness to them, personally, not just the characters, that has commercial value and cannot be exploited without their consent.

The Ninth Circuit, analyzing the California statute that protects privacy and publicity rights (including virtually

identical language to that at issue in this petition), determined that the actors might, in fact, have a claim, but the question is one for the jury.

In contrast, however, the courts below have determined that no model may maintain a claim for violation of statutory rights of privacy and publicity by the non-consensual commercial misuse of her likeness where a court, without a jury, finds the misuse to be newsworthy.

In the case at bar, the jury determined the very issue of "confusing similarity" lying at the heart of the *Wendt* case, by finding that an ordinary reader would falsely believe that the story was about petitioner, when in fact it was not. Despite the jury's finding, however, the courts below have absolutely immunized all photographs and removed the commercial right of exploitation ordinarily owned by an actor and model, regardless of the issue of confusing similarity.

On May 22, 2000, this Court, in *United States v. Playboy*, 120 S. Ct. 1878 (2000) struck down as unconstitutional a blanket ban where "a less restrictive alternative" was available. If a blanket ban is unconstitutional, how, we respectfully posit, can a blanket protection (without regard to identity, content and intent) be constitutionally permissible?

The answer it, is not. That was this Court's edict in *Time Inc. v. Hill*, 385 U.S. 374 (1967) and unless this Court acts in the case at bar, the destruction of the Constitutionally protected right of privacy and publicity in the State of New York will be rendered immutable.

The similarity between *Wendt* and *Messenger*, concerning property interests, is evident. If the article in

Messenger was truly a current and newsworthy event, then the right to publish the photographs would live in the hands of the publisher. In essence, the publisher would own the property interests to the photographs for newsworthy use. There would be no right under ¶¶ 50-51 of the New York Civil Rights Act (the "statute").

As stated in *Binns*:

> [I]t would not be within the evil sought to be remedied by that act to construe it so as to prohibit the use of the name, portrait or picture of a living person in truthfully recounting or portraying an actual current event as is commonly done in a single issue of a regular newspaper.

Binns v. Vitagraph Co., 210 N.Y. 51, 56 (1913).

Where, however, the article or photograph is fictionalized, the Statute is applicable. As stated in *Binns*:

> The first picture of the series was essentially a picture of the plaintiff, although included therewith was a place having relation to the other parts of the pictures exhibited — but the last picture of the series had no connection whatever with any other place or person or with any event. His alleged personal movements as exhibited in the now well known form of moving pictures had no relation to the other pictures, and it was not designed to instruct or educate those who saw it. . . . By such pictures an audience would be amused and the maker of the films and the exhibitors would be enriched. . . . We hold that

> the name and picture of the plaintiff were used by the defendant as a matter of business and profit and contrary to the prohibition of the statute. It is urged that there is danger of serious trouble in the practical enforcement of any rule which may be adopted in construing and enforcing the statute so far as it relates to purposes of trade.

Binns, supra, 210 N.Y. at 58.

Therefore, the issues raised in *Wendt* and *Messenger* parallel. Paramount contends that there is a direct relation between the robots and the characters "Norm" and "Cliff" on "Cheers." Wendt contends that there is no relation between the robots and Cheers, but rather, there is commercial exploitation of the actors' likenesses themselves.

In *Messenger*, the jury determined that there was no connection between her photographs and the false and fictionalized story that the publisher now claims is protected by virtue of it being newsworthy, and that her image was being photographed for commercial profit by the publisher who had a contractual duty to inform the parents of the minor of the intended use. The photo session was held in private; the pictures were not taken in public. There could not be, as a matter of law, an implied waiver or consent by the minor. Further, the minor's livelihood was dependent on a favorable image that the photos were to set forth, in accordance with the representations made by the defendants to induce her involvement.

In no fashion was Ms. Messenger a member of the public who "voluntarily became part of the festival" as in *Murray v. New York Magazine*, 27 N.Y. 2d 406, 409 (1971).

Nor was she alongside a person who was admittedly a public figure, as in *Howell v. New York Post*, 81 N.Y. 2d 115, 118-119 (1991). Nor were her photographs an "external objective criteria" of a news topic who is "never mentioned, nor are any of the ideas or opinions it expresses attributed to him" as in *Arrington v. New York Times*, 55 N.Y. 2d 433, 441 (1982). Nor is this a case where a third party took pictures with the consent of the plaintiffs family in 1982, agreed with the photographer to use the photos in a particular manner, for which the photographer 6 years thereafter sold the picture to a magazine which annexed the picture to an objective news item. The photographer was never named in the suit and the news article never identified plaintiffs family in a negative light. *See Finger v. Omni Publs. Intl.*, 77 N.Y. 2d (1990).

II. THE NINTH CIRCUIT'S DETERMINATION THAT CONFUSING SIMILARITY (LIKE KNOWING FALSEHOOD) IS FOR THE JURY COMPORTS WITH *TIME v. HILL*, THE SECOND CIRCUIT'S CONTRARY FINDING DOES NOT.

The question of whether consumers will be confused into believing that the plaintiff actors consented to the use of their likenesses on robots in bars around the country was, in the Ninth Circuit's view, proper *solely* for a jury. *Wendt v. Host International*, 125 F.3d 806 (1997) [# 99-1567]. The question of whether consumers would be confused into believing that Ms. Messenger consented to the use of her picture with her purported autobiography was, in the Second Circuit's view, *never* to be reached by a jury if a Court (alone) found the autobiography to be newsworthy. This "new" impediment threatens to become permanent in New York, and ignores the reciprocal constitutional right of the model to be vindicated from gross fictionalization.

Messenger provides a case in which the courts have protected, rather than burdened, more speech than what is required. There can be no absolute immunity for the press to knowingly publish an article that is false and which causes damage to one's reputation, or invades upon a citizen's privacy. This has never been suggested by this Court. To do so now, in the new millennium, would reverse 200 years of case precedent acknowledging the inherent constitutional right of private citizens for vindication and or to "subsequently punish" the press for their abusive content and ridicule. *Patterson v. Colorado*, 205 U.S. 454, at 462 (1907), quoting *Commonwealth v. Blanding*, 3 Pick 304, 313, 314, 20 Mass 304 (1825). *See, also*, *Respubica v. Oswald*, 1 Dallas, 319, 325 (1788) and *Near v. Minnesota*, 283 U.S. 697, 714 (1931).

III. THE MERE FACT THAT A STATE STATUTE IS INVOLVED IN *MESSENGER* DOES NOT PRECLUDE REVIEW BY THIS COURT.

The controlling question here is solely whether the courts below have applied a state rule that incorrectly interprets the First Amendment. *Times v. Sullivan*, 376 U.S. 254, at 265 (1964).

When the language of the statute is not at issue *per se*, and the effect directly interferes with a constitutional right, this Court must retain jurisdiction to determine whether the interpretation of the statute passes constitutional muster. As this Court unanimously stated just seven years ago:

> There is no doubt that we are bound by a state court's construction of a state statute. . . . But here the Wisconsin Supreme Court did not, strictly

> speaking, construe the Wisconsin statute in the sense of defining the meaning of a particular statutory word or phrase. Rather, it merely characterized the "practical effect" of the statute for First Amendment purposes. . . . This assessment does not bind us. Once any ambiguities as to the meaning of the statute are resolved, we may form our own judgment as to its operative effect.

Wisconsin v. Mitchell, 508 U.S. 476, 483- 484 (1993).

Here, the courts below did not review any specific language of the statute in issue. Rather, the courts below determined that regardless of statutory language, and regardless of a jury's finding, photographs falsely associating a model with a fictional and salacious autobiography are protected free speech under the First Amendment, even where the fictionalization is clear, gross, and intentional.

Accordingly, this Court has proper jurisdiction to review these findings.

CONCLUSION

It is respectfully requested that this Court grant the petition.

Respectfully submitted,

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